DEC 27 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

323 U.S. # 4
BOA-CAP

No. 786

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING; GEORGE C. McRAE, Treasurer of Fremont County, Wyoming; and ERNEST H. HARTMAN, Assessor of Fremont County, Wyoming, PETITIONERS AND APPELLEES BELOW,

VS.

UNITED STATES OF AMERICA,
RESPONDENT AND APPELLANT BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LOUIS J. O'MARR, Attorney General of the State of Wyoming, Capitol Building, Cheyenne, Wyoming;
L. A. CROFTS, County and Prosecuting Attorney, Fremont County, Wyoming, Lander, Wyoming;
JOHN U. LOOMIS,
EDWARD T. LAZEAR,
Majestic Building, Cheyenne, Wyoming,
Counsel for Petitioners.

DECEMBER, 1944.

144337

EASTWOOD PRINTING CO., 3491 CURTIS STREET, DENVER

SUBJECT INDEX.

PETITION.

PAGES

SUMMARY STATEMENT OF MATTER INVOLVED.. 1

STATEMENT AS TO JURISDICTION 3

1. Date of Judgment 3
2. Statutory provision believed to sustain jurisdiction 3
3. Nature of case 3
4. Statute relied on by the United States 4
5. Cases believed to sustain jurisdiction 4
6. Grounds upon which it is contended that the questions involved are substantial 4

QUESTION PRESENTED 4

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT 5

BRIEF.

I *Opinions of the Courts Below* 9

II. *Jurisdiction* 9

III. *Statement of the Case* 9

IV. *Specification of Assigned Errors Intended to be Urged* 9

ARGUMENT 10

Summary 10

I. *The land here involved is not property of the United States which is immune from state taxation*..... 10

Only property of the United States itself is immune, and property of others is not 10

Lands to which the United States holds naked legal title is not immune 10

PAGES

Only where real ownership is in the United States, is property immune 10

Cases cited by the Circuit Court of Appeals are consistent with the foregoing 12

The property involved is not immune because it is not the property of the United States but property of the Indians 16

The land involved is not such an instrumentality of the United States as Guardian of the Indians as to exempt it from local taxation where Congress has not so provided 17

Taxable lands purchased with funds of Indians are not exempt where Congress does not so provide. *Shaw v. Oil Corporation*, 276 U. S. 576 17

"Tribal lands" referred to in *Shaw v. Oil Corporation*, are lands of the United States itself, that is lands of the public domain set aside for Indians.... 19

This court has cited *Shaw v. Oil Corporation* with approval 19

The Indian policy of developing independence and selfsufficiency involved in *Shaw v. Oil Corporation* is similar to that involved here—one on an individual basis, the other on tribal basis. Judge Kennedy's opinion in the District Court on this point referred to 19-20

The Shoshone Judgment Fund Act exhibits the intention of placing responsibility upon the Indians 21

The following matters are inconsistent with an implication of tax exemption 21

(a) Congress as Guardian failed to speak, where exercise of discretion as to the wisdom of exemption is necessary 21

(b) These Indians are not impoverished but rich in lands and otherwise. They are amply able to pay the taxes involved 22

PAGES

(c) Such an implication is inconsistent with previous enactments of Congress on similar subject matter 22

(d) Such an implication is inconsistent with the policy of developing the self-sufficiency of the Indians 22

(e) Such an implication is inconsistent with the statutory provision that restoration to tribal ownership shall be subject to "valid existing rights and claims" 22

The developing policy of encouraging self-sufficiency referred to in *Shaw v. Oil Corporation* is applicable here 23

Nothing in the legislative history of the Shoshone Judgment Fund Act indicates that tax exemption was intended 23

Tax exemptions will not be implied in favor of Indians, and if Congress intends such an exemption it must say so explicitly. *Oklahoma Tax Commission v. United States*, 319 U. S. 598 23

The taking of title in the name of the United States as trustee was only a restriction upon alienation.. 26

The doctrine of *Shaw v. Oil Corporation*, in the light of *Oklahoma Tax Commission v. United States*, clearly applies under the facts of this case..... 27

The Constitutional provisions relied on by the Circuit Court of Appeals are inapplicable under the circumstances of this case 28

The lands purchased were privately owned taxable lands, and all previous rights of the Indians therein had been ceded and relinquished 29

Restoration to tribal ownership is immaterial here and is consistent with taxation 29

The lands involved are not freed from taxation by reason of the existing legal framework..... 29

PAGES

Any claimed distinction between tax immunity and tax exemption has no substantial basis 30

The termination of the right of the petitioners to tax the lands involved can only be sustained by implication 30

The controlling considerations are the purchase with Indian funds of taxable lands and the failure of Congress to terminate the right to tax 30

CONCLUSION 31

APPENDIX 33

Shoshone Judgment Fund Act 33

TABLE OF CASES, CONSTITUTIONAL PROVISIONS and STATUTES.

Board of Commissioners v. Seber, 318 U. S. 705..... 19

Clallam County v. United States, 263 U. S. 341.....4, 6, 11

Exchange Trust Co. v. Drainage District, 278 U. S. 421....6, 10

Goudy v. Meath, 203 U. S. 146 30

Irwin v. Wright, 258 U. S. 219.....4. 6. 10

Lee v. Osceola Improvement District, 268 U. S. 643.....12, 13

Mayo v. United States, 319 U. S. 441 .....12, 13

McCurdy v. United States, 264 U. S. 484.....12, 15, 16

Mullen Benevolent Corp. v. United States, 290 U. S. 89..12,13

New Brunswick v. United States, 276 U. S. 547.....6, 11

Oklahoma Tax Commission v. United States, 319 U. S. 598 .....4, 5, 6, 15, 19, 22, 23, 26, 27, 28, 30

Shaw v. Oil Corporation, 276 U. S. 575 .....
.....3, 4, 5, 6, 15, 17, 19, 23, 26, 27

Shoshone Indians v. United States, 85 Ct. Cl. 331..... 22

Superintendent v. Commissioner, 295 U. S. 418.....19, 26

The Kansas Indians, 72 U. S. 737..... 24

United States v. Allegheny County, 322 U. S. 174....4, 6, 12, 13

PAGES

United States v. Brown, 8 Fed. (2d) 564 26

United States v. Hester (C. C. A. 10), 137 Fed. (2d) 145 26

United States v. Kagama, 118 U. S. 375 24

United States v. Rickert, 188 U. S. 432 ..... 12, 13, 14, 15, 16, 19, 28, 30

United States v. Sandoval, 231 U. S. 28 24

United States v. Shoshone Tribe, 304 U. S. 111 ..... 1, 22

Van Brocklin v. Tennessee, 117 U. S. 151 12

Wisconsin Railroad Co. v. Price County, 133 U. S. 496 12

Witherspoon v. Duncan, 71 U. S. 210 ..... 6, 10

Constitution of the United States, Art. 4, Sec. 3 ..... 10, 29

Constitution of the United States, Art. 1, Sec. 8 ..... 10, 29

Constitution of the United States, Art. 6 ..... 10, 29

Act of February 8, 1887, c. 119, 24 Stat. 388, as amended, U. S. Code, Tit. 25, §331 and following 14

Act of March 3, 1905, 33 Stat. 1016 29

Act of June 28, 1906, c. 3572, 34 Stat. 539 15

Act of June 18, 1934, c. 576, §5, 48 Stat. 985, U. S. Code Tit. 25, §465 22

Act of June 26, 1936, c. 831, §1, 49 Stat. 1967, U. S. Code Tit. 25, §501 22

Act of June 25, 1938, 52 Stat. 1114, 1156 1

Act of July 27, 1939, 53 Stat. 1128 ..... 2, 4, 33

Act of Feb. 24, 1942, c. 113, §1, 56 Stat. 121, U. S. Code Tit. 25, §465(a) 22

Judicial Code, §240(a), as amended, 28 U. S. C. A., §347 3

Senate Report No. 746, 76th Congress, First Session 11, 23

House Report No. 1112, 76th Congress, First Session 11, 23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No.

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING; GEORGE C. McRAE, Treasurer of Fremont County, Wyoming; and ERNEST H. HARTMAN, Assessor of Fremont County, Wyoming, PETITIONERS AND APPELLEES BELOW,

vs.

UNITED STATES OF AMERICA,
RESPONDENT AND APPELLANT BELOW.

PETITION.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED.

The Shoshone Tribe of Indians recovered a judgment of over four million dollars against the United States. *United States v. Shoshone Tribe,* 304 U. S. 111. Congress made an appropriation to pay the judgment. Act of June 25, 1938, 52 Stat. 1114, 1156. Later Congress prescribed the

manner in which the judgment fund should be used. Act of July 27, 1939, 53 Stat. 1128. See pages 33-35, infra.)

Section 3 (a) of the latter act provides that not to exceed $1,000,000 of the judgment fund, or interest thereon, shall be available for expenditure upon the request of the tribe and with the approval of the Secretary of the Interior for the purchase of lands. Section 4 provides for the establishment of land use districts within the Indian reservation, and within adjacent lands formerly ceded to the United States by the Indians, for the purpose of consolidating Indian and privately owned lands within such districts for the more beneficial use of such lands by the Indians and non-Indians. Section 5 provides for the restoration to tribal ownership of various lands, including those purchased under the act, as the non-Indian lands within any such district are acquired; and provides that all such restorations shall be subject to valid existing rights and claims. The act contains no provision that the lands purchased shall be free from state taxation.

The lands here involved were purchased pursuant to the Act of 1939 (R. 1; 15, 16) with funds of the Shoshone Tribe. At the time of purchase all of such lands were privately owned taxable lands in Fremont County, Wyoming (R. 18; 20; 34). After the lands were thus purchased the County continued to tax them and some of the lands were sold for taxes (R. 6, 7, 15, 16; 34, 35).

The United States filed its complaint seeking to quiet title to such lands in the United States and to restrain the petitioners from continuing to tax them (R. 1).

The petitioners answered (R. 15, 21) alleging in part that title to the lands in question was taken in the name of the United States as Trustee for the Indians under a settled policy of the United States, determined in contemplation of the fact that the Indians are no longer a dying or vanishing race but on the contrary are increasing more rapidly than the white race, for the purpose of placing such Indians upon lands owned by the tribe where they may live in harmony with their own aims and ideals as an integral part of American life and upon the basis of a self-sustaining economy; that such policy has been repeatedly stated in the

annual reports of the Secretary of the Interior; and that the granting of the relief sought would deprive Fremont County of a substantial amount of annual tax revenue upon which it depends in carrying out its governmental functions (R. 19, 24, 25).

The United States filed a Motion for Summary Judgment on the Pleadings (R. 20).

The action was heard in the District Court upon the Petition, Answer, Amended Answer and Motion for Summary Judgment on the Pleadings under the theory, shared by all parties, that there were no controverted questions which were material to the decision of the principles which control the case (R. 33).

The District Court overruled and denied the motion for summary judgment and entered judgment dismissing the complaint, holding that the tax involved is not a forbidden tax upon a Federal instrumentality under the principle stated by this Court in *Shaw v. Oil Corporation,* 276 U. S. 575, since Congress has not provided that the lands should be free from state taxation (R. 26 to 35, inclusive).

The United States appealed to the Circuit Court of Appeals (R. 35). The Circuit Court of Appeals reversed the judgment of the District Court and ordered that the cause be remanded to the latter Court with directions to enter a judgment as prayed in the complaint, holding that the lands involved are lands of the United States itself which are immune from taxation (R. 39 to 44, inclusive).

STATEMENT AS TO JURISDICTION.

1. The date of the judgment to be reviewed is October 10, 1944.

2. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code, § 240(a) as amended, 28 U.S.C.A. § 347; Act of Feb. 13, 1925, c. 229, 43 Stat. 936; also Act of July 27, 1939, 53 Stat. 1128 (infra, 33-35).

3. This is an action filed in the District Court of the United States for the District of Wyoming by the United States seeking to quiet title in it as against the taxing authorities of Fremont County, Wyoming (the Petitioners

herein), with respect to lands purchased pursuant to the provisions of the Act of Congress of July 27, 1939, 53 Stat. 1128, title to such lands having been taken pursuant to such act in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians; and seeking also to restrain such taxing authorities from continuing to tax such lands (R. 1). The petitioners answered (R. 15, 21), and the United States moved for summary judgment on the pleadings. The District Court denied the motion and entered judgment dismissing the cause of action of the United States on the merits (R. 26-35), it being agreed by all parties that no controversial question of fact was involved. The United States appealed to the Circuit Court of Appeals for the Tenth Circuit (R. 35). The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause to the District Court with directions to enter judgment as prayed for in the Complaint of the United States (R. 39-44). The question directly involved is whether the lands purchased are free from state taxation as lands of the United States itself or as an instrumentality of a function of government of the United States.

4. The United States relies upon the authority of the Act of Congress of July 27, 1939, 53 Stat. 1128, known as the Shoshone Judgment Fund Act, to sustain its title to the lands involved and to sustain its claim that such lands are free from taxation. The validity of such statute is in that way involved, and the pertinent parts thereof are set out in the Appendix hereto at pages 33-35.

5. The following cases are believed to sustain the jurisdiction of this court: *Shaw v. Oil Corporation*, 276 U. S. 575, *Oklahoma Tax Commission v. United States*, 319 U. S. 598; *Irwin v. Wright*, 258 U. S. 219, 229; *United States v. Allegheny County*, 322 U. S. 174, 182; *Clallam County v. United States*, 263 U. S. 341, 344.

6. The grounds upon which it is contended that the questions involved are substantial are stated under the heading "Reasons Relied on for Allowance of the Writ," infra, pages 5-7, and in the parts of the Petition there referred to.

QUESTION PRESENTED.

The question presented is whether the purchase of privately owned, taxable lands of a state, for an Indian tribe, with funds of the tribe, precludes the further taxation of such lands by the state, where the Act of Congress authorizing the purchase does not provide that such lands shall be free from state taxation, and where title to such lands as provided by such Act is taken in the name of the United States in trust for the Indians pursuant to a settled policy of the United States, determined in contemplation of the fact that the Indians are no longer a dying or vanishing race but on the contrary are increasing more rapidly than the members of the white race, for the purpose of placing such Indians upon lands owned by the tribe where they may live in harmony with their own aims and ideals as an integral part of American life and upon a basis of a self-sustaining economy. The specifications of assigned errors intended to be urged, numbered 1 to 6 inclusive, appearing at pages 9-10, infra, are adopted by reference and made a part of this paragraph.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has decided an important question of Federal law which is in conflict with applicable decisions of this court; and the question decided is one which on the particular facts, has not been, and should be, decided by this Court. We have stated the general nature of this question under the summary statement of the matter involved. In amplification of that statement we call the court's attention to the following cases:

In *Shaw v. Oil Corporation*, 276 U. S. 575, this court held that taxable land purchased under authority of Congress for an Indian, with funds of the Indian, title being taken in the name of the Indian subject to restriction upon his power of alienation, remained taxable by the State where Congress had not provided for freedom from state taxation. Holding that not every act of Congress in relation to the welfare of the Indians would be held to be so intimately connected with a governmental function as to create a tax free instrumentality, in the absence of express declara-

tion of non-taxability by Congress, and recognizing the progressive policy designed to develop economic independence for the Indians, the court concluded that taxable lands purchased for an Indian with funds of the Indian should remain taxable where Congress had not expressly provided they should be free from state taxation.

In *Oklahoma Tax Commission v. United States*, 319 U. S. 598, the court recognized that equality of privilege and equality of obligation should be inseparable associates and referred to the trend of the court's decisions sweeping away many of the means of tax favoritism. The court stated, with reference to the taxation of Indian property, that restriction of alienation of such property is not the equivalent of a grant of Congressional immunity, and that if Congress intends to prevent a state from levying a general non-discriminatory tax (in that case an estate tax), applying alike to all its citizens, it should say so in plain words, because such a conclusion cannot rest on dubious inferences.

In the following cases among others: *Irwin v. Wright*, 258 U. S. 219, 229; *Exchange Trust Co. v. Drainage District*, 278 U. S. 421; *Witherspoon v. Duncan*, 71 U. S. 210; *New Brunswick v. United States*, 276 U. S. 547; *Clallam v. United States*, 263 U. S. 341; *United States v. Allegheny County*, 322 U. S. 174, 186 to 188; this court has held that immunity from taxation extends to property owned by the United States itself and not to property actually owned by others, even though legal title may be in the United States.

The case presented by this petition is one in which privately owned taxable lands of Fremont County, Wyoming, have been purchased for and at the request of the Indian tribe with funds of the Indians. The lands are the property of the Indian tribe, and the United States merely holds legal title as trustee. The holding of such legal title while a restriction upon alienation by the Indians does not in itself result in tax immunity. *Oklahoma Tax Commission v. United States*, 319 U. S. 598.

The decision of the Circuit Court of Appeals conflicts with applicable decisions of this Court, particularly with *Shaw v. Oil Corporation*, 276 U. S. 575, and *Oklahoma Tax Commission v. United States*, 319 U. S. 598, and such de-

cision, conflicting as it does with substantial taxing powers of Fremont County, Wyoming, constitutes the decision of an important question of Federal law which should be decided by this Court. The decision of the Circuit Court of Appeals is based upon a situation of fact not previously passed upon by this Court, that is one where lands are purchased for a group of Indians constituting an Indian tribe (rather than for an individual Indian) with their own funds, and title is taken in the name of the United States in trust for the tribe (rather than in the name of the Indian or the Indian tribe).

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding such Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Tenth Circuit had in the case numbered and entitled on its docket, No. 2932, United States of America, Appellant, vs. The Board of County Commissioners of the County of Fremont, Wyoming; George C. McRae, Treasurer of Fremont County, Wyoming; and Ernest H. Hartman, Assessor of Fremont County, Wyoming, Appellees, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals for the Tenth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated December 26th, 1944.

Louis J. O'Marr, Attorney General of the State of Wyoming, Capitol Building, Cheyenne, Wyoming;
L. A. Crofts, County and Prosecuting Attorney, Fremont County, Wyoming, Lander, Wyoming;
John U. Loomis,
Edward T. Lazear,
Majestic Building, Cheyenne, Wyoming,
Counsel for Petitioners.

BRIEF.

I.

Opinions of Courts Below.

The opinion in the District Court (R. 26-32) is reported in 53 F. Supp. 395. The opinion in the Circuit Court of Appeals (R. 39-44) is reported in 145 Fed. (2d) 329.

II.

Jurisdiction.

A statement of the grounds on which jurisdiction of this court is invoked has already been made in the foregoing Petition at pages 3-4, and the same is hereby adopted and made a part of this brief.

III.

Statement of the Case.

A statement of the case has already been made in the foregoing Petition at pages 1-3 and the same is hereby adopted and made a part of this brief.

IV.

Specification of Assigned Erors Intended to Be Urged.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in remanding the cause to the District Court with directions to enter judgment as prayed in the complaint.

3. The Circuit Court of Appeals erred in holding that the lands involved are not taxable by Fremont County, Wyoming.

4. The Circuit Court of Appeals erred in holding that the tax assessments and tax sales involved are invalid.

5. The Circuit Court of Appeals erred in holding that the lands involved constitute property of the United States itself and are therefore immune from state or county taxes.

6. The Circuit Court of Appeals erred in holding that the lands involved are immune from state and county taxation under the following provisions of the Constitution of the United States: Article 4, Section 3; Article 1, Section 8; and Article 6.

ARGUMENT.

Summary.

It is the contention of the Petitioners that the land involved is not property of the United States itself which is immune from state taxation, but, on the contrary, that such land is the taxable property of the Indians to which the United States as guardian holds mere legal title as trustee. Privately owned taxable land purchased with the funds of Indians is not such an instrumentality of that function of the United States in its guardianship of the Indians, as to imply the exemption of such lands from taxation where Congress has not expressly so provided, when the lands are purchased pursuant to a policy of developing the independence and self-sufficiency of the Indians, even though title is taken in the name of the United States in trust for the Indian tribe.

I.

The land here involved is not property of the United States which is immune from State taxation.

Only property of the United States itself is immune from local taxation. Property of others to which the United States merely holds legal title in trust is not so immune.

This Court has held that lands to which the United States holds legal title only, equitable title and real ownership being in others, is not immune from local taxation.

Irwin v. Wright, 258 U.S. 219, 229.
Exchange Trust Co. v. Drainage District, 278 U.S. 421.
Witherspoon v. Duncan, 71 U.S. 210.

In each of the three cases last cited this Court held that where equitable title had passed to entrymen holding final certificates under the land laws of the United States, entitling them to patents, the lands were taxable to such

equitable owners under the laws of the State, notwithstanding legal title still remained in the United States.

Conversely this Court has held that where equitable title and real ownership are in the United States, legal title being in others, the property involved is immune from State taxation.

New Brunswick v. United States, 276 U.S. 547.
Clallam County v. United States, 263 U.S. 341.

In each of the two cases last cited the legal title to the property sought to be taxed by the State was in a corporation, but the United States was the real and equitable owner of the property by virtue of ownership of all of the stock of the corporation. This Court held that such property was immune from taxation.

In the case at bar the land taxed is the property of the Indians, not the property of the United States. The land was purchased with funds of the Indians, at their request and approval, and with the clear intent that the lands should be and remain the property of the Indians. While it was at first contemplated that the Shoshone Tribe would advance $500,000 for the purchases and that the United States would match this with an equal amount, it was finally determined, at the insistence of the Director of the Budget, that the Shoshones would advance the entire amount of $1,000,000. To offset the interest which the Arapahoes would have in the lands purchased it was provided by Section 6 of the Shoshone Judgment Fund Act (Appendix pages 33-35), that the Shoshones should be reimbursed with interest at four per centum per annum for the amounts so advanced from joint funds to the credit of the Shoshones and Arapahoes or from future accruals to such fund, as and when said funds should accrue. In other words, the Shoshones have advanced the entire amount of the purchases in the first instance and may be reimbursed for the half interest of the Arapahoes from such joint funds of the two tribes as may exist or come into existence. The Shoshones will be reimbursed in no other way, and the United States has paid no part of the purchases. (Senate Report No. 746, 76th Congress, First Session; House Report No. 1112, same session. It is difficult to conceive how Congress could have made it clearer under the circumstances

that the lands involved are the property of the Indians, and that the United States holds only legal title as trustee for them. It is obvious as a matter of law that the United States acted as guardian. The statute authorizing the purchases (Shoshone Judgment Fund Act, Appendix pp. 33-35) shows that the funds of the Indians themselves are to be used for that purpose. With respect to title the Act provides merely that title shall be taken in the name of the United States in trust for the Indians. All that this indicates is a purchase of lands by a guardian with funds of the ward, and a taking of the title in the name of the guardian as trustee in order to restrict alienation. Clearly the real ownership is in the Indians and only bare legal title is in the United States.

The following cases cited by the Circuit Court of Appeals upon this point are not inconsistent with the foregoing principles under the facts involved in this case.

Van Brocklin v. Tennessee, 117 U.S. 151.
Lee v. Osceola Improvement District, 268 U.S. 643.
Mullen Benevolent Corporation v. United States, 290 U.S. 89.
United States v. Allegheny County, 322 U.S. 174.
Mayo v. United States, 319 U.S. 441.
United States v. Rickert, 188 U.S. 432.
McCurdy v. United States, 264 U.S. 484.
Wisconsin Railroad Co. v. Price County, 133 U.S. 496.

Wisconsin Railroad Co. v. Price County, supra, holds that where something remains to be done to entitle a patentee to receive a patent, legal and equitable title remains in the United States and the land is not subject to local taxation. This is the mere converse of the rule that where every such thing has been done and the patent should issue, the real ownership is in the patentee and the land is subject to local taxation.

Van Brocklin v. Tennessee, supra, merely states the general rule that property of the United States is exempt under the Constitution of the United States from state taxation. The lands there sought to be taxed had been purchased by the United States at tax sale pursuant to congressional au-

thority and it was held that while the lands were so owned by the United States they were not subject to state taxation. In that case this court recognized (p. 169) that lands to which the United States holds only legal title, equitable ownership being in others, are subject to state taxation.

In *Lee v. Osceola Improvement District,* supra, assessments were made against lands within a road improvement district and it was later found that some of the lands were owned by the United States. No attempt was made to collect the assessment until title passed from the United States. It was held that the state could not then impose such special taxes on account of benefits resulting from improvements made before the United States parted with its title. The case is decided with respect to property "owned" by the United States at the times referred to. No question was involved as to whether the United States had only legal title with actual ownership in others.

In *Mullen Benevolent Corporation v. United States,* supra, the basis for the decision was that assessments for special benefits are not collectible from, and may not be assessed against, lands purchased by the United States under the Reclamation Act of June 17, 1902 (c. 1093, 32 Stat. 388). It was not questioned but that these lands were the property of the United States itself.

In *United States v. Allegheny County,* supra, the property which was the basis of the tax sought to be collected was machinery which belonged to the United States itself and was leased by it to a contractor for the production of war materials. It was held that such property was not subject to local taxation.

In *Mayo v. United States,* supra, the tax was upon the privilege of distributing fertilizer in the State of Florida. The United States itself owned the fertilizer and was distributing it thru the Secretary of Agriculture under congressional authority. This Court said the proposed fees were like a tax upon the right to carry on the business of the post office or to sell United States bonds thru Federal officials, and held that the transaction was immune from state taxation.

In *United States v. Rickert,* supra, the property sought to be taxed was property of the United States itself, that is lands of the public domain which had been set aside for Indian use, or improvements thereon and personal property purchased with money of the United States and put into the hands of the Indians. Such lands had been allotted to individual Indians under the provisions of the General Allotment Act (Act of February 8, 1887, c. 119, 24 Stat. 388, as amended, U.S. Code, Tit. 25, §331 and following). Section 1 of that act provides that where any tribe of Indians has been located upon any reservation created for their use, the President may cause allotments thereof to be made to individual Indians thereon. Section 4 provides for the allotment of lands of the United States to Indians not residing on a reservation or for whose tribe no reservation has been provided. Section 5 provides that so-called patents should be issued in the names of the allottees to be held in trust by the United States for a period of twenty-five years when the United States would convey the allotted lands to the Indian allottees or their heirs unless the time should be extended by the President. The legal effect of this arrangement was described by this court in the opinion as follows (p. 436):

> "In other words the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee."

This court did not decide that case upon the theory that the property involved was immune property of the United States itself, but upon the theory that such property was an instrumentality of the United States in its governmental function as guardian of the Indians. In that connection the Court said (p. 437): "* * * These lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to several allottees * * *. These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have

not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887 (General Allotment Act) * * * is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race. * * *."

McCurdy v. United States, supra, was decided upon the theory of *United States v. Rickert* and the facts were similar except that in the McCurdy case the lands were purchased by the United States from another tribe for the benefit of the Indians and they were allotted under the provisions of the Osage Allotment Act. (Act of June 28, 1906, c. 3572, 34 Stat. 539). That Act provided that homestead allotments thereunder should be inalienable and non-taxable until otherwise provided by Congress, and that other or surplus allotments thereunder should be taxable after three years, or when a certificate of competency had been issued to the allottee under authority of the act, or in case of death of the allottee. The question was whether the lands involved had become taxable under the provisions of the act and it was held that they had not. This court said the suit was brought by the United States as guardian and trustee for the Indians.

That the foregoing allotment cases were decided upon the Federal instrumentality theory was recognized by this Court in *Shaw v. Oil Corporation*, 276 U.S. 575, 579, and in *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 603.

Hence neither *United States v. Rickert*, supra, nor *McCurdy v. United States*, supra, are authority for the proposition that lands title to which is held by the United States as guardian or trustee for Indians are immune from taxation as property of the United States itself, because those cases were decided upon the Federal Government instrumentality theory. Furthermore in both of those cases, as we have previously suggested, the property sought to be taxed was property of the United States itself in that it was either lands of the public domain, set aside for Indian use, or improve-

ments thereon, or property purchased by the United States itself for the Indians. Although the lands had been allotted they had not become the property of the Indian allottees, who had no immediate right to patents in fee, but only the right to possess and use the lands for a period of twenty-five years, while title and ownership in the meantime remained where it had been, that is, in the United States. In those cases the United States acted as a trustee only in the sense that it retained ownership subject to certain assumed fiduciary obligations to the Indian wards. The title and actual ownership existing in the United States had never terminated or been conveyed to the Indian allottees; while in the case at bar the actual ownership of the Indians established by their purchase of the lands remains in them and the United States has only a naked legal title as trustee. In those cases the lands were the property of the United States itself, that is part of the public domain, or property purchased by the United States with its own funds, which the Indians were permitted to use; while here the lands are privately owned lands purchased by the Indians with their own funds, the only interest of the United States being bare legal title as trustee.

Hence if *United States v. Rickert*, supra, and *McCurdy v. United States*, supra, are considered as decided under the rule that property of the United States itself is immune from state taxation, the conclusion must follow that the property here involved is not so immune, because it is not the property of the United States but is the property of the Indians.

Where a guardian's own lands are appropriated by the guardian to the beneficial use of the ward a large measure of retained ownership and control in the lands by the guardian may be implied, particularly where the guardian is the United States acting under its traditional policy toward the Indian wards, but where the guardian buys land for the ward with the ward's own funds and the guardian merely takes title in its own name as trustee for the ward it cannot be implied that the guardian intended to establish extensive rights of ownership in the property in itself, but merely that it intended to exercise its function of guardianship and to restrict alienation.

This brings us to consider whether the lands here involved are non-taxable as an exempt instrumentality of the Federal Government.

The taxable land here involved which was purchased with the funds of the Indians is not such an instrumentality of the United States in its function as guardian of the Indians as to exempt such land from local taxation where Congress has not expressly so provided.

This court has held that lands purchased with restricted funds of Indians from the privately owned taxable lands of a state are not so intimately connected with that function of the Government of the United States in its guardianship of the Indians as to exempt such lands from local taxation where Congress has not expressly so provided. *Shaw v. Oil Corporation*, 276 U.S. 575.

In the case last cited privately owned taxable lands of the State of Oklahoma were purchased for an Indian with his restricted funds. The congressional authority under which the lands were purchased did not provide that they should be free from local taxation. The lands were leased for oil and gas exploitation. The questions presented were whether the lands purchased were subject to local taxation or whether such a tax was forbidden as one upon a federal instrumentality. It was held that the lands were subject to local taxation under the circumstances of that case. This Court said:

> "What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514. The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting apart, by allotment or otherwise, tribal lands or the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental functions as clearly to require independence of all state

control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation.

* * * * *

"The early legislation affecting the Indians had as its immediate object the closest control of the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners.

* * * * *

"The act under which Tiger's allotted land was leased is entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes." * * * In this as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.

"In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though

> Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks.
>
> • • • • •
>
> "It cannot be assumed that Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a tax exemption by implication. In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land."

The "tribal lands or the public domain" referred to by Chief Justice Stone in the paragraph first above quoted clearly are those involved in the allotment cases represented by *United States v. Rickert*, supra. As we have already pointed out (pp. 14-16, supra), such lands were characterized by the fact that they were part of the public domain and as such were the property of the United States itself. It was this fact, we submit, and not the fact that they may have been first set aside for tribal use before they were allotted to individual Indians, which led to the conclusion that there was such an intimate connection with the guardianship of the Indians as clearly to require independence of all state taxation.

Shaw v. Oil Corporation, supra, has been cited with apparent approval in the following subsequent decisions of this court: *Superintendent v. Commissioner*, 295 U.S. 418, 421; *Board of Commissioners v. Seber*, 318 U.S. 705, 717; *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 611.

The doctrine of *Shaw v. Oil Corporation*, supra, applies to the case here presented. Here as there privately owned taxable lands were purchased with funds of the Indians, and in each case under congressional authority which did not provide that such lands should be non-taxable. The Indian policy which was involved in *Shaw v. Oil Corporation*, supra, was one designed to emancipate and foster the independence of the Indians under a system of individual allotments held

under restriction for a period of years and resulting eventually in conveyance by patent to the individual allottees. The Indian policy which is involved in this case is one designed to develop the economic self-sufficiency of the Indians by placing them upon lands owned by the tribe where they may live as an integral part of American life. In other words the same policy of developing the independence and self-sufficiency of the Indians has merely been translated from an individual to a tribal basis; and tax exemption by implication is equally inconsistent in either instance.

Judge Kennedy in his opinion in the District Court (R. 29-31) put the matter as follows:

> "In that case *(Shaw v. Oil Corporation)* the first question concerned the power of the Secretary of the Interior to exempt from taxation for an individual Indian, land or the income therefrom, purchased with restricted funds. In this case the purchase of lands was with Indian funds for the benefit of the entire tribe and the United States is attempting to secure exemption from taxation which is the legal equivalent to such action by the Secretary of the Interior. In each case the right to exempt from taxation in the absence of Statutory declaration is involved. We can see no logical distinction in legal principle whether the lands so purchased were for the benefit of an individual Indian or for a tribe of Indians.
>
> "The second question, answered in the negative by the Supreme Court, decreeing that the tax is not a forbidden tax upon a Federal instrumentality, is identical in principle in the cited case and the case at Bar. The Supreme Court held that the Secretary of the Interior, absent the direction of Congress, could not exempt the Indian lands or the proceeds therefrom from taxation and here the United States is attempting, without the authority of Congress, to secure the exemption of these lands from taxation.
>
> • • • • •
>
> "It would seem that Congress is gradually attempting a policy of broadening the scheme of rehabilitating the Indian by adding responsibility to his

role as a ward. The High Court itself is cognizant of the desirability of such a program. This is illustrated by the language of Chief Justice Stone in the Shaw case, supra, in the language found on page 580:

* * * * *

"Any plan of rehabilitation for the Indian to be a success must gradually eliminate the matter of treating the Indian as a ward to the extent that he is guarded as a small child by a parent. His successful future as a citizen of the country entitled to exercise the right of franchise can only be brought into fruition by requiring that he assume some responsibility of citizenship, if he is to have all of its privileges."

The Shoshone Judgment Fund Act (pp. 33-35, infra) itself clearly shows the intention to place a large measure of responsibility on the Indians and to encourage their self-sufficiency. Section 3(a) provides that $1,000,000 shall be available for purchase of such lands as are here involved "upon the request of the tribe and with the approval of the Secretary." Section 4 provides that "in all transactions involving tribal Indian land the consent of the Shoshone and Arapahoe Tribes shall first be obtained." Section 6 provides that all purchases of lands of the character here involved shall receive the approval of the Shoshone and Arapahe Tribal Councils or of the business committee thereof.

It is inconsistent with the purpose of a policy designed to result in Indian self-sufficiency and to enable them to live as an integral part of American life, for those responsible for the administration of Indian affairs to seek tax exemption for the taxable lands here purchased by the Indians in the absence of any provision by Congress that the lands should be tax exempt. As we have indicated Congress acted in authorizing the purchases as the guardian of the Indians. It had the discretion and power to determine whether it was for the best interest of its wards to declare these lands exempt. It cannot be implied from its failure to do so that it intended that lands taxable when purchased should thereafter become exempt. A ward is not exempted from taxation by the nature of his status, and the guardianship of the United States over Indians does not in itself result in tax

exemption in their favor. *Oklahoma Tax Commission v. United States*, infra, pages 25, 26; *Superintendent v. Commissioner*, infra, 26, 27.

Implied tax exemption is inconsistent with the fact that these Indians are not impoverished. They possess an enormous tract of the finest lands in Wyoming. It has been judicially declared that: "The reservation comprises the choicest and best watered portion of the State of Wyoming." *Shoshone Indians v. United States*, 85 Ct. Cl. 331, 341. The Shoshones have recently acquired a judgment fund of over $4,000,000 (*United States v. Shoshone Tribe*, 304 U.S. 111) which has enabled them to buy at least $1,000,000 in value of additional lands of a similar character. (Shoshone Judgment Fund Act, infra, pages 33-35). There is nothing to indicate that the Indians are not amply able to pay the taxes involved. Every implication is to the contrary. Clearly the taxes would have been paid, and none of the lands would have been sold for taxes, if those in charge of Indian affairs for the United States had not taken the position which resulted in non-payment and eventually in the bringing of this action.

An implication of tax exemption where Congress has not so provided, is also inconsistent with previous enactments of Congress. In the following instances Congress has provided for the purchase or other acquisition of taxable lands for Indian tribes, title to be taken in the name of the United States in trust for the tribes, and has provided in each instance that such lands shall be exempt from local taxation: Act of June 18, 1934, c. 576, § 5, 48 Stat. 985, U.S. Code Tit. 25 § 465; Act of Feb. 24, 1942, c. 113, § 1, 56 Stat. 121, U.S. Code Tit. 25 § 465 (a); Act of June 26, 1936, c. 831, § 1, 49 Stat. 1967, U. S. Code Tit. 25 § 501.

As previously pointed out an implication of tax exemption is likewise inconsistent with the policy of developing the self-sufficiency of the Indians so that they can live as an integral part of American life. If the Indians are to live as a part of the whole citizenry on the basis of self-sufficiency they must pay taxes on taxable land as do other citizens.

The statute authorizing the purchase of the lands here involved provided that restorations to tribal ownership of

lands therein referred to, which included the restoration of lands so purchased, should be subject to "valid existing rights and claims." This is inconsistent with the claim here made that the taxable lands purchased should not be exempt from the taxing right of the county and state.

The developing attitude of the United States toward its Indian wards from one of complete protection, as a matter of necessity, to that of encouragement of independence or self-sufficiency was noted by Chief Justice Stone in *Shaw v. Oil Corporation*, supra. It is not disputed here that the lands involved were purchased pursuant to a policy of encouraging the self-sufficiency of the Indians living on lands of the tribe as an integral part of American life, nor that the Indians are no longer a weak and vanishing race but that they are increasing more rapidly than is the white race.

There is no word or syllable in the legislative history of the Shoshone Judgment Fund Act to indicate that tax exemption of the lands involved was ever suggested or considered. This strongly indicates that such exemption was not intended. (Senate Report No. 746, 76th Congress, First Session; House Report No. 1112, same Session.)

This court has recently held that tax exemptions will not be implied in favor of Indians, and that if Congress intends such an exemption it must say so explicitly. *Oklahoma Tax Commission v. United States*, 319 U.S. 598.

In the case last cited the United States sought to recover inheritance taxes collected by the State of Oklahoma on property of Indians. The property consisted of the following: Land exempt from direct taxation; land not so exempt; restricted cash and securities held for the Indians by the Secretary of the Interior; and miscellaneous properties and insurance.

The Court in holding that all of the property involved was taxable except the lands expressly exempt from direct taxation by Act of Congress, stated the following propositions:

Tax exemptions are not granted by implication.

The tax immunity of Indian property formerly said to

rest on constitutional implication cannot now be resurrected in the form of statutory implication. (This clearly refers to the lack of express constitutional power over Indians, and means that implication will not be piled on implication. The only express provision in the Constitution of the United States granting Congress power with respect to Indians appears in Article 1, Section 8 of the Constitution, and provides as follows: "The Congress shall have power * * * to regulate commerce with * * * the Indian Tribes * * *." Otherwise the power has been implied as a matter of necessity. See: *The Kansas Indians*, 72 U.S. 737; *United States v. Kagama*, 118 U.S. 375; *United States v. Sandoval*, 231 U.S. 28.)

Tax exemption in favor of Indian property will not be implied upon the assumption that Congress intended such exemption in view of the existing legal framework.

Congressional restriction of Indian property is not alone sufficient to imply tax exemption.

Application of the normal rule against tax exemption by statutory implication prevents the reading of such an implication into the Act of Congress affecting Indian property.

A ward is not exempted from taxation by the nature of his status, and the guardianship of the United States over Indians does not in itself result in tax exemption in their favor.

The recent trend of decisions of the court doing away with means of tax favoritism should be followed.

In reaching these conclusions the Court said in part:

> "The respondent's second and major contention is that the State may not impose an estate tax upon the transfer of the restricted cash and securities because Congress by placing restrictions upon this property manifested a purpose to exempt it from Oklahoma estate taxes. Restricted property of an Indian is that which may not be freely alienated or used by the Indian without the approval of the Secretary of the Interior. We find, upon an examination of both the cases dealing generally with the taxation of Indian property and the statute which imposes the

restriction, that the restriction, without more, is not the equivalent of a congressional grant of estate tax immunity for the cash and securities.

"The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the Government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. * * * For a period of time, Indian lands held in trust by the United States were found to be constitutionally tax-exempt on the theory that they were federal instrumentalities, i. e., that the lands were held by the United States for the Indians, and were therefore non-taxable. United States v. Rickert, 188 U. S. 432.

* * * * *

"The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.

* * * * *

"We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

* * * * *

"This Court has repeatedly said that tax exemptions are not granted by implication. * * * If congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. 'Nontaxability and restriction upon alienation are distinct things,' *Superintendent v. Commissioner,* supra, 421, and when Congress wants to require both nonalienability and nontaxability it can, as it has so often done, say so explicitly.

"It is true that our interpretation of the 1933 statute must be in accord with the generous and pro-

tective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. * * *.

"Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. * * * The trend of these cases should not now be reversed."

The taking of title in this case in the name of the United States as trustee for the Indians was in effect only a restriction upon alienation and does not result in tax exemption.

The statute (pages 33-35, infra) provides merely that title shall be taken in the name of the United States in trust for the Indians. This necessarily results in a restriction upon alienation. There is nothing in the statute to indicate that more was intended.

Restriction upon alienation does not result in tax exemption.

Superintendent v. Commissioner, 295 U. S. 418.
Oklahoma Tax Commission v. United States, 319 U. S. 598.
Shaw v. Oil Corporation, 276 U. S. 575.
United States v. Hester (C.C.A. 10), 137 Fed. (2d) 145.
United States v. Brown, 8 Fed. (2d) 564, 567.

In *Superintendent v. Commissioner,* supra, this Court said at page 421:

"Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent

> with that relationship that exemption is a necessary implication. *Non-taxability and restriction upon alienation are distinct things.* Choate v. Trapp, 224 U. S. 665, 673. The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden." (Italics added.)

In *Oklahoma Tax Commission v. United States,* supra, at page 607 this Court quoting with approval some of the above language from Superintendent v. Commissioner, said:

> " 'Non-taxability and restrictions upon alienation are distinct things,' and when Congress wants to require both non-alienability and non-taxability *it can, as it has so often* done, say so explicitly." (Italics added.)

See further quotations from that case at pages 24-26 of this brief, particularly the language to the effect that tax exemption will not be implied from the existing legal framework. See the language quoted from *Shaw v. Oil Corporation,* supra, at page 19 of this brief. The other cases cited are to the same effect.

We submit that in the absence of any indication by Congress that more was intended, it must be assumed that the taking of title in the name of the United States in trust for the Indians was intended only to create a restriction upon alienation and that tax exemption does not result.

The doctrine of *Shaw v. Oil Corporation,* supra, in the light of *Oklahoma Tax Commission v. United States,* supra, we submit, is that taxable lands purchased with the funds of Indians under the authority of the Unted States as their guardian, pursuant to a policy designed to encourage the self-sufficiency of the Indians, and to permit them to live as an integral part of American life, are not exempt from local taxation unless Congress in the exercise of its discretion as such guardian determines the wisdom of such tax exemption and so provides. This is so because in such a case the Government function involved, that is the guardianship of the Indians, rests upon constitutional implication and there is not such an intimate connection between such purchases and the performance of such function as clearly

to require tax exemption in the absence of provision therefor. This doctrine is based not only upon logic but upon the soundest reasons of public policy, because it involves the power of Congress to deprive a state of vital tax revenue. The determination of whether such power has been exercised or was intended should not be permitted to rest upon implication, particularly when the exercise of the power involves in turn the exercise of the guardian's discretion as to whether the power should be invoked in the particular case. It is only in the clearest kind of case that such an implication of tax exemption may be permitted. Congress has the power to provide for tax exemption. When it finds it advisable to exercise the power it is not too much to require that it say so in plain words as this Court has said in *Oklahoma Tax Commission v. United States,* supra. The fact that the guardian sees fit to take title in its own name as trustee for the ward and that the ownership of the lands purchased is to be preserved in the tribe, does not, we submit, show an intention to establish tax exemption with such clarity as to justify such exemption by implication. The taking of title in the name of the United States as trustee merely indicates, as we have said, an exercise of the function of guardianship and an intention to restrict alienation; while the preservation of ownership in the tribe indicates only a purpose to comply with the existing Indian policy. Tax exemption may not be implied from the fact of tribal ownership. Such fact must be considered in its proper setting to determine its effect in that regard. And the fact that tribally owned lands, derived from the nontaxable lands of the United States, were held, at an earlier period of Indian development, and under other circumstances, to result in freedom from state taxation *(United States v. Rickert,* supra), has little if any bearing upon whether freedom from taxation will be implied here, where the lands were purchased from the taxable lands of the state with the funds of the Indians themselves, and were placed in tribal ownership under a policy of developing Indian self-sufficiency on a tribal basis in order to permit the Indians to live as an integral part of American life.

Since the lands here involved are not immune or exempt from taxation either upon the ground that they constitute property of the United States itself, or that they con-

stitute a tax exempt instrumentality of the United States in its guardianship of the Indians, it follows that the basic provisions of the Constitution of the United States relied on by the Circuit Court of Appeals are not applicable, that is: Article 4, Section 3; Article 1, Section 8; and Article 6.

The lands here involved were privately owned taxable lands when purchased by the Indians. The fact that they may at one time have been a part of the Indian reservation, as suggested by our opponents in the Circuit Court of Appeals, does not alter this fact. The Indians had ceded the lands involved to the United States for the very purpose of selling them to private owners and had thereby relinquished all their rights (Act of March 3, 1905, 33 Stat. 1016).

Nor is it material whether the lands involved are restored to the Indian reservation. There is no provision in the Shoshone Judgment Fund Act that any lands should be restored to any reservation but only that restoration shall be made to tribal ownership. The purpose is made clear, we submit, by the language of the Act itself which provides in Section 5 that lands shall be restored to tribal ownership as non-Indian lands are acquired within a given land use district, and by Section 4 where it is provided that consolidation of Indian and privately owned lands within such districts shall be affected to the end that Indian and non-Indian holdings may be consolidated for more beneficial use. In other words a regrouping for more beneficial use is all that is involved. All of this is a part of the policy that the Indians should be placed upon lands owned by the tribe where they may live as an integral part of American life on the basis of a self-sustaining economy. Nor is such a regrouping inconsistent with the fact and intention that taxable lands purchased by a tribe and owned by it should remain taxable and at the same time that other tribal lands, that is lands owned by the United States and set aside by it as a reservation for the use of the tribe, should remain non-taxable.

The respondent urges in effect that the lands here involved should be freed of local taxation by implication because of the existing legal framework, that is the legal

framework under which lands derived from the United States are held by Indians under different circumstances, as in *United States v. Rickert,* supra, (sometimes referred to as held in trust), and lands which are held as tribal lands under different circumstances, that is reservation lands owned by the United States which it permits the Indians to use. But this Court has clearly said in *Oklahoma Tax Commission v. United States,* supra, that such tax exemption will not be implied by reason of the existing legal framework.

The claimed distinction which respondent has heretofore urged between tax immunity and tax exemption has no substantial basis. If the lands here could be held to be property of the United States itself, they would, of course, be constitutionally immune. Otherwise the suggested distinction becomes only a play on words. This Court has frequently used the terms with apparent interchangeability. The real question is whether the lands here involved will be held free from local taxation where Congress has not so provided, and we submit that in determining this question under the authorities any such suggested distinction becomes unimportant.

The termination of the right of the petitioners to tax the lands here involved can only be sustained by implication. This Court has said in *Oklahoma Tax Commission v. United States,* supra, that this will not be permitted; and in *Goudy v. Meath,* 203 U. S. 146, 149, the Court said with respect to an Indian, that "the rule of exemption for him must be the same as for other citizens—that is, that no exemption exists by implication but must be clearly manifested."

We submit that the controlling considerations which determine the continuing taxability of the lands here involved are, (1) that such lands were purchased with the funds of the Indians themselves; (2) that they were taxable lands of Fremont County, Wyoming, when purchased; and (3) that Congress could have, but did not see fit to terminate the right of the local authorities to tax them.

CONCLUSION.

The Indians are no longer a weak and vanishing race. They are ready for economic self-sufficiency as an integral part of American life. These Indians occupy some of the finest lands of the State of Wyoming and are well-to-do. They enjoy all the privileges of citizenship including the right to vote with consequent political power. They enjoy the privileges of the public schools of the State and may avail themselves of them to the extent they choose. The public welfare of the State is available to them. They enjoy the privileges of the courts of the State, both civil and criminal. And finally, they enjoy the privilege of serving with their fellow citizens in the armed forces, where they are distinguishing themselves for aptitude and valor. These citizens do not require such a discriminatory preference as would result from permanent tax immunity of the fine Wyoming lands purchased by them. Congress has clearly recognized this fact in the legislation here involved.

The writ of certiorari should be granted, and upon further hearing the judgment of the Circuit Court of Appeals should be reversed and the case remanded with directions to affirm the judgment of the District Court.

Respectfully submitted,

LOUIS J. O'MARR, Attorney General of the State of Wyoming, Capitol Building, Cheyenne, Wyoming;
L. A. CROFTS, County and Prosecuting Attorney, Fremont County, Wyoming, Lander, Wyoming;
JOHN U. LOOMIS,
EDWARD T. LAZEAR,
Majestic Building, Cheyenne, Wyoming,
Counsel for Petitioners.

APPENDIX.

The Shoshone Judgment Fund Act, Sections 1, 3(a)(b), 4 to 7, inclusive, Act of July 27, 1939, 53 Stat. 1128, 25 U.S.C. Sections 571 to 577, reads as follows:

"AN ACT

"To provide for the distribution of the judgment fund of the Shoshone Tribe of the Wind River Reservation in Wyoming, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, authorized and directed, with the advice and consent of the business council of the Shoshone Tribe of the Wind River Reservation in Wyoming, to prepare a roll showing the members of said tribe living on the date of the approval of this Act, and such roll shall form the basis for the distribution of the judgment fund of said tribe created as the result of the passage of the Act of June 25, 1938 (52 Stat. 1114-1156), and accrued interest thereon.

* * * * *

"SEC. 3. (a) Not to exceed $1,000,000 of said judgment fund, or interest thereon, shall be available for expenditure upon the request of the tribe and with the approval of the Secretary of the Interior, for the purchase of lands in the manner prescribed in section 6 of this Act.

(b) The sum of $125,000 of said judgment fund, or interest thereon, shall, at the request of the tribe and with the approval of the Secretary of the Interior, be set aside as a loan fund for making loans to individual members, or groups of members, of said tribe under such rules and regulations as may be prescribed by the Secretary of the Interior.

* * * * *

"SEC. 4. That the Secretary of the Interior be, and he is hereby, authorized and directed to establish land-use districts within the diminished and ceded portions of the Wind River Indian Reservation, Wyoming, and, under such rules and regulations as he may prescribe, to effect the consolidation of Indian and privately owned lands within said districts through exchange, relinquishment, donation, assign-

ment, or purchase of lands or interest therein, including water rights or surface rights to lands, improvements thereon and improvements on undisposed-of ceded lands, to the end that the respective Indian and non-Indian land holdings may be consolidated for more beneficial use. Exchanges of lands hereunder shall be made on the basis of equal value, and the value of improvements on lands to be relinquished to the Indians or by Indians to non-Indians shall be given due consideration, and allowance made therefor in the valuation of lieu lands. This section shall apply to tribal land, and trust or otherwise restricted Indian allotments, whether the allottees be living or deceased. In all transactions involving tribal Indian land, the consent of the Shoshone and Arapaho Tribes shall first be obtained. Title to all lands or interests therein acquired by the Government through exchange of tribal land shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming. Title to lands exchanged for individual Indian allotments, or purchased for individual Indians with restricted funds shall be taken by the United States in trust for the individual Indian allottee or heir. The right herein granted individual Indians to acquire lands by purchase with restricted funds or by exchange shall not extend to lands on the ceded or opened portion of the reservation.

"SEC. 5. That the Secretary of the Interior is hereby directed to restore to tribal ownership all undisposed-of surplus or ceded lands within the land use districts which are not at present under lease or permit to non-Indians; and, further, to restore to tribal ownership the balance of said lands progressively as and when the non-Indian owned lands within a given land use district are acquired by the Government for Indian use pursuant to the provisions of this Act. All such restorations shall be subject to valid existing rights and claims: *Provided*, That no restoration to tribal ownership shall be made of any lands within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation.

"SEC. 6. That the sum of $1,000,000 authorized in section 3 for use in carrying out the land purchase and consolidation program hereinbefore authorized shall remain

available until expended and any amount expended shall be reimbursed with interest at 4 per centum per annum to the Shoshone Tribe of Indians of the Wind River Reservation from joint funds to the credit of the Shoshone and Arapaho Tribes of the Wind River Reservation or from future accruals to said joint fund, as and when said funds accrue. Title to all land purchases made hereunder shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming. All purchases of lands or interests therein made pursuant to this section shall receive the approval of the Shoshone and Arapaho Tribal Councils or of the business committees thereof.

"SEC. 7. That in no event shall any portion of the Shoshone judgment fund become liable, payable, or subject to any debt or debts contracted prior to the passage of this Act by any Indian of the Shoshone Tribe except debts to the United States or to the tribe.

"Approved, July 27, 1939."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	15
Appendix	16

CITATIONS

Cases:

Boyle, County Treasurer v. *United States and Federal Public Housing Authority*, No. 69, October Term, 1944, decided January 2, 1945	7
City of Cleveland v. *United States and Federal Public Housing Authority*, No. 68, October Term, 1944, decided January 2, 1945	7
City of Springfield v. *United States*, 99 F. 2d 860, certiorari denied, 306 U. S. 650	7
Federal Public Housing Authority v. *Guckenberger*, No. 388, October Term, 1944, decided January 2, 1945	7
Irwin v. *Wright*, 258 U. S. 219	10
Kansas Indians, The, 5 Wall. 737	9
Lee v. *Osceola Imp. Dist.*, 268 U. S. 643	7
McCurdy v. *United States*, 246 U. S. 263	11
McCurdy v. *United States*, 264 U. S. 484	11
Mayo v. *United States*, 319 U. S. 441	7, 12, 13
Minnesota v. *United States*, 305 U. S. 382	11
New York Indians, The, 5 Wall. 761	9, 10
Oklahoma Tax Comm'n. v. *United States*, 319 U. S. 598	11
Scripps-Howard Radio v. *Comm'n*, 316 U. S. 4	13
Shaw v. *Oil Corp'n*, 276 U. S. 575	11, 13, 14, 15
Shoshone Tribe v. *United States*, 299 U. S. 476	2
United States v. *Albama*, 313 U. S. 274	7
United States v. *Allegheny County*, 322 U. S. 174	7, 8, 13
United States v. *Rickert*, 188 U. S. 432	8, 9, 11
United States v. *Shoshone Tribe*, 304 U. S. 111	2, 9
United States v. *Stewart*, 311 U. S. 60	13
Van Brocklin v. *Tennessee*, 117 U. S. 151	7
Wisconsin Railroad Co. v. *Price County*, 133 U. S. 496	10

626162—45——1

Constitution and statutes:

	Page
U. S. Const:	
Art. IV, sec. 3	8
Art. VI	7, 8
Act of March 3, 1905, 33 Stat. 1016	3
Act of June 25, 1938, 52 Stat. 1114	3
Act of July 27, 1939, 53 Stat. 1128, 25 U. S. C. secs. 571–577 (Shoshone Judgment Fund Act)	3, 10, 14, 16
Miscellaneous:	
H. Rep. No. 1112, 76th Cong., 1st sess	14
19 Op. A. G. 161	8
S. Rep. No. 746, 76th Cong., 1st sess	14

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 786

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING: GEORGE C. MCRAE, TREASURER OF FREMONT COUNTY, WYOMING; AND ERNEST H. HARTMAN, ASSESSOR OF FREMONT COUNTY, WYOMING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 26–32) is reported in 53 F. Supp. 395. The opinion of the circuit court of appeals (R. 39–44) is reported in 145 F. (2d) 329.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on October 10,

1944 (R. 44). The petition for a writ of certiorari was filed on December 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a state may tax lands purchased by the United States pursuant to the Shoshone Judgment Fund Act of 1939, title to which is held by the United States in trust for the Shoshone and Arapaho tribes of Indians of the Wind River Reservation, Wyoming.

STATUTE INVOLVED

The pertinent statute is set out in the Appendix, *infra*, pp. 16–20.

STATEMENT

In 1938 the Shoshone Tribe of Indians recovered a judgment against the United States for an amount in excess of four million dollars. *United States* v. *Shoshone Tribe*, 304 U. S. 111. This amount represented the value of a part of the original Wind River, Wyoming, reservation held to have been taken by the United States by placing thereon, without the consent of the Shoshone Tribe, a band of Arapaho Indians.[1] An appro-

[1] The history of the relations between the United States and the Shoshone Tribe which resulted in this judgment is fully set out in a prior decision in the same litigation. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

priation to pay the judgment was made in the Act of June 25, 1938, 52 Stat. 1114, 1156, and in the Shoshone Judgment Fund Act of 1939 (Appendix, *infra*, pp. 16–20) Congress prescribed the manner in which the judgment fund should be used. By Section 3 (a) of the latter Act, up to $1,000,000 was made available for expenditure, upon request of the Tribe and with the approval of the Secretary of the Interior, in the purchase of land as prescribed in Section 6. By Section 4, the Secretary was directed to establish "land-use districts" in the diminished and ceded portions of the Wind River Reservation,[2] and to consolidate the Indian and privately owned lands in such districts by exchange and purchase. By Section 5, the Secretary was directed to restore to tribal ownership all undisposed of surplus or ceded lands within the land use districts, and progressively to restore to tribal ownership the remaining non-Indian owned lands in such land use districts as and when acquired for Indian use pursuant to the provisions of the Act. Section 6 provided for the acquisition of lands by purchase with the funds allocated by Section 3 (a), with

[2] In 1904, by agreement with the Indians, the portion of the reservation lying north of the Wind River was ceded to the United States. Act of March 3, 1905, 33 Stat. 1016. Thereafter, that portion became known as the ceded portion and the remainder of the reservation as the diminished portion. Some of the ceded lands were eventually disposed of to white settlers and placed on the tax rolls of Fremont County. See the trial court's opinion, R. 26–27.

the approval of the Shoshone and Arapaho Tribal Councils, and with respect to such lands it was provided that "Title to all land purchases made hereunder shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming." The Act is silent with respect to the taxable status of lands so acquired by the United States.

Pursuant to the 1939 Act, the Secretary of the Interior purchased for these tribes various tracts which were originally tribal lands and which had been taxed by Fremont County, Wyoming, while in the hands of private persons (R. 27). All taxes due and owing, and which were a lien against these lands at the time title was acquired by the United States, were paid in full (R. 7, 22). These lands, after their acquisition by the United States, continued to be assessed and taxed against the United States by Fremont County, and some of the tracts were sold for non-payment of taxes thus levied (R. 27).

The United States accordingly filed its complaint (R. 1–15), the material allegations of which follow: That certain specific tracts were purchased by the United States as trustee for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming, pursuant to the Shoshone Judgment Fund Act of 1939, and that the United States was the owner thereof in

fee simple in trust for those tribes (R. 1–6); that the defendants, after title was acquired by the United States, and without the consent of the United States, assessed the lands for taxes for the year 1941 in the name of United States Trustee, and the taxes being unpaid, such lands were advertised for sale and were sold to Fremont County for the taxes claimed to be due for the year 1941; that the lands had also been assessed for the year 1942, and that assessment for 1943 was being threatened; that all taxes due and owing which were a lien upon the lands prior to the time title was acquired by the United States had been paid in full, and that the lands were not subject to taxation for the year 1941 and thereafter, and that the sale of the lands was null and void (R. 6–7). The complaint also alleged that certain additional tracts had been placed upon the assessment roll of Fremont County, and that the defendants were attempting to collect taxes thereon for 1942 and 1943 and that title to such tracts had been acquired by the United States prior to such assessment, the lands havings been acquired by purchase under the provisions of the 1939 Act; and that the tax sales and all assessments for taxes made since the Government acquired title were null and void (R. 7–14). The complaint prayed judgment quieting title in the United States, declaring that the defendants had no right, title, claim, or interest in the lands, that the de-

fendants and their successors in office be restrained from asserting any right, title, claim, or interest in such lands, and that they be restrained from taxing or attempting to tax them (R. 15).

Petitioners filed an answer, admitting all material allegations of the complaint (R. 15–20) except that it was denied that the assessment for taxes and sale of the lands in question were without the consent of the United States (paragraphs 3 and 4, R. 15, 16).

There being no genuine issue of any material fact, the United States filed a motion for summary judgment on the pleadings (R. 20). Appellees in effect joined in this motion by filing an amended answer asking for the dismissal of the complaint (R. 21–25).

After a hearing the trial court filed a memorandum opinion (R. 26–32), and on January 14, 1944, entered judgment overruling and denying the Government's motion for summary judgment, and dismissing the Government's complaint (R. 32–35). On October 10, 1944, the circuit court of appeals reversed the judgment and remanded the cause to the trial court with directions to enter judgment as prayed by the Government in its complaint.

ARGUMENT

1. The circuit court of appeals properly held that, in the absence of congressional consent, the lands in suit were not subject to state taxation.

Property of the Federal Government is immune from state taxation. *Van Brocklin* v. *Tennessee,* 117 U. S. 151. In that case this Court rejected a contention that property of the United States was exempt only if the state by statute declared it to be so or if such a provision was contained in the Enabling Act under which a state was admitted to the Union. Thus the Court held that the Federal Government enjoys a constitutional immunity from state taxation rather than an exemption dependent upon the will of the state. This immunity was found to be a necessary implication from the supremacy clause in Article VI of the Federal Constitution (pp. 155–156). The *Van Brocklin* decision has been adhered to in an unbroken line of decisions by this Court, the most recent of which are *United States* v. *Alabama,* 313 U. S. 274, 279; *Mayo* v. *United States,* 319 U. S. 441, 447; *United States* v. *Allegheny County,* 322 U. S. 174; *City of Cleveland* v. *United States and Federal Public Housing Authority; Boyle, County Treasurer* v. *United States and Federal Public Housing Authority;* and *Federal Public Housing Authority* v. *Guckenberger,* Nos. 68, 69, 388, October Term, 1944, decided January 2, 1945.

Such immunity exists "so long as title remains in the United States." *Lee* v. *Osceola Imp. Dist.,* 268 U. S. 643, 645; cf. *City of Springfield* v. *United States,* 99 F. 2d 860, 863 (C. C. A. 1), certiorari denied, 306 U. S. 650. The same principle applies

to property whose title is held by the United States in trust for its Indian wards. In *United States* v. *Rickert,* 188 U. S. 432, it was ruled that allotted lands held by the Government in trust for an individual Indian could not be taxed by the state even to the Indian. Since the lands were held by the Government in execution of its plans relating to the Indians (p. 437) "there was no power in the State * * * to assess and tax the lands in question until at least the fee was conveyed to the Indians." After pointing out that the whole policy of Congress in dealing with its Indian wards might be defeated if the state could tax the lands, the Court quoted (p. 438) from the *Van Brocklin* decision and stated (p. 441): "* * * no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians." The immunity of such trust property was found to lie not only in Article VI of the Federal Constitution, but also in Article IV, section 3, vesting power to dispose of property of the United States (pp. 438–439). The Court approved (*ibid.*) an opinion of the Attorney General (19 Op. A. G. 161, 169), holding such property non-taxable by the state on the ground that the trust is "an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority." In *United States* v. *Allegheny County,* 322 U. S. 174, 188, this Court discussed the *Rickert* holding

with approval and in so doing recognized that the property in the *Rickert* case was immune and not simply exempt from state taxation.

Petitioners attempt (Pet. 14) to distinguish the *Rickert* case on the ground that the lands there involved were, prior to allotment, part of the public domain. But the holding in the *Rickert* case was not based on any such consideration. The principle of the decision, as already noted, was that the state could not, by taxation or otherwise, interfere with or jeopardize the execution of federal policy in dealing with its Indian wards. The same principle applies here. Moreover, the lands in suit were formerly tribal lands, and were purchased with funds which represented the value of tribal lands taken from the Tribe; and the title is held in the same way as lands which the Tribe has never relinquished, *i. e.*, the legal title is in the United States and the beneficial ownership is in the Tribes. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 117. Congress clearly intended that such lands when acquired should be restored to their former status as tribal lands.

Since the state cannot tax allotted lands held by the United States in trust for its Indian wards, even to the Indians (see p. 8, *supra*), it follows that it cannot tax property held by the United States in trust for Indian Tribes, either to the United States or the Tribes. Cf. *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761.

Petitioners assert (Pet. 10–13) that the United States holds only a naked legal title and hence the lands should be held taxable on the theory of such cases as *Irwin* v. *Wright,* 258 U. S. 219, which hold that land may be taxed to an entryman where nothing remains to be done but the issuance by the United States of a land patent.[3] These cases are irrelevant. As pointed out in *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496, 505, such cases deal with a situation where the Government has no interest in the lands which would justify it in withholding a patent; since nothing but a ministerial act remains to be done, the entryman has a legal right to have the title conveyed. Here Congress has directed that the title be held by the United States in trust, and the Tribes have no legal right to compel a conveyance of title. That a title so held by the United States is not merely a naked fee, even where the land is allotted to an individual Indian, has al-

[3] Petitioner's assumption that if legal title were in the Tribes the land would be taxable is not warranted. The provisions of the Shoshone Judgment Fund Act of 1939 evidence a Congressional policy opposed to the emancipation theory. Congress has recognized the desirability of a return to the tribal status by the establishment of land use districts in tribal ownership and by provisions for the equipping of the Indians with farm implements, seed, etc. to enable them to subsist. There is thus no material difference between the lands here sought to be taxed and other tribal lands, and, therefore, it cannot be assumed that the lands would be taxable if title were in the Tribes. *The New York Indians,* 5 Wall. 761.

ready been held by this Court in *United States* v. *Rickert,* 188 U. S. 432, and *Minnesota* v. *United States,* 305 U. S. 382, 386. Obviously, it is also true where the Government holds the property in trust for Indian Tribes.

Petitioners (Pet. 17–22) rely chiefly on the case of *Shaw* v. *Oil Corp'n,* 276 U. S. 575. That case is not in point. The lands held taxable there were neither allotted nor tribal lands. They were purchased by the Secretary of the Interior for an individual Indian with restricted oil royalties; the claim to tax immunity was based solely upon what this Court denominated a "mere conveyancer's restriction" imposed by the Secretary and authorized by Congress as a step in the process of emancipation of the Indian. The Court was of the opinion that land so acquired by an Indian was taxable to the Indian in the absence of a statutory prohibition. The *Shaw* case is not apposite because here title is in the United States, rather than in the Indian.[4] The controlling effect of title being in the Government is clear from the decisions of this Court. *McCurdy* v. *United States,* 246 U. S. 263, 272; *McCurdy* v. *United States,* 264 U. S. 484, 486; *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 603. The doctrine of the *Shaw* case is applicable only where

[4] Other cases relied on by petitioner (Pet. 22–28) are likewise distinguishable on the ground that legal title was in the Indian rather than in the United States.

title is in some instrumentality other than the Government itself; where title is in the United States the courts will not go behind it. As said by this Court in *Mayo* v. *United States,* 319 U. S. 441, 447–448:

> The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 578. But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

Petitioners do not deny that this property is held by the United States in the exercise of a legitimate governmental function. This being so, and title being in the United States, the absence of express consent is fatal to petitioners' claim.

Petitioners call attention (Pet. 22) to prior Acts in which Congress has expressly prohibited taxation of property held in trust for Indians by the United States, and urge that, since in the present instance there is no such prohibition, consent of Congress to taxation of these lands may be read into the statute by implication. Too much significance may not be read into the failure of different Congresses to use identical language in various statutes. Cf. *United States* v. *Stewart,*

311 U. S. 60, 69; *Scripps-Howard Radio* v. *Comm'n*, 316 U. S. 4, 11. Since Congress must expressly consent to taxation of property title to which is held by the United States (see e. g., the quotation from the *Mayo* opinion at p. 12, *supra*; *United States* v. *Allegheny County*, 322 U. S. 174, 177) as distinct from its instrumentalities, such provisions in prior Acts are merely declaratory.

2. Even if it were not the rule that taxability of property held by the United States must rest upon an express Congressional consent, it is submitted that the decision of the circuit court of appeals is correct. *Shaw* v. *Oil Corp'n*, 276 U. S. 575, does not hold that, where Congress does not speak on the subject of tax immunity of the property of federal instrumentalities, the state may tax. It holds (p. 578) that in such cases the court will determine the question "from the purpose and character of the legislation."

As already shown, the policy of the legislation here pertinent was to restore lands formerly part of the tribal lands to the tribal status they formerly had, under the same conditions of title, *i. e.*, legal title in the United States and beneficial title in the Tribes. Thus, the Senate Committee on Indian Affairs in reporting the bill which became the Shoshone Judgment Fund Act of 1939, stated: "The bill, therefore, has the effect of restoring to the reservation lands which were previously ceded by the tribe to the United States for settlement by non-Indians", and further that "it has been the

special aim * * * in drafting the bill to safeguard the Shoshone patrimony as represented by the judgment fund which, by the decision of the courts, has been substituted for more than 1,000,000 acres of land owned and occupied exclusively by the Shoshone Tribe as part of its reservation prior to 1879." S. Rep. No. 746, 76th Cong., 1st sess., embodied also in H. Rep. No. 1112, reporting the same bill. In recommending passage of the bill, the Secretary of the Interior, in a letter incorporated in the committee reports, stated that "the future of the Shoshone and Arapahoe Tribes is in the livestock industry. Range is, of course, essential." And so the problem was met by the provisions of Section 4 providing for land-use districts on a tribal basis and by the direction to the Secretary to restore to tribal ownership all undisposed of surplus or ceded lands in such districts. Since certain lands within these districts were in non-tribal ownership, the acquisition of such tracts by purchase or exchange was provided for in Sections 1 and 6.

These provisions evidence a policy on the part of Congress to deal with these lands on a tribal basis. The policy is thus opposed to that which influenced this Court in the *Shaw* case, *viz.*, emancipation of the individual Indian to a point where he would be self-sustaining. Here a major phase of the Congressional policy of "safeguarding the patrimony" of the Tribes is the restoration of the

Wind River lands to their former status as tribal lands. If these lands can be taxed and sold by the state, the areas will again become checkerboarded and this objective of Congress be frustrated. In the *Shaw* case, 276 U. S. 575, 579, the Court explained the non-taxability of tribal lands as resting upon the proposition that they are "so intimately connected with the performance of governmental functions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation." Here the lands have been restored to tribal status by Congressional direction, and they are of precisely the character defined in the above quotation from the *Shaw* case.

CONCLUSION

The question presented was correctly decided by the court below. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
J. EDWARD WILLIAMS,
Acting Head, Lands Division.
VERNON L. WILKINSON,
FRED W. SMITH,
WALTER J. CUMMINGS, Jr.,
Attorneys.

JANUARY 1945.

APPENDIX

The Act of July 27, 1939, 53 Stat. 1128–1130 (25 U. S. C., secs. 571–577) provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, with the advice and consent of the business council of the Shoshone Tribe of the Wind River Reservation in Wyoming, to prepare a roll showing the members of said tribe living on the date of the approval of this Act, and such roll shall form the basis for the distribution of the judgment fund of said tribe created as the result of the passage of the Act of June 25, 1938 (52 Stat. 1114–1156), and accrued interest thereon.

SEC. 2. That there shall be credited on the books of the Office of Indian Affairs the sum of $2,450 to each member of said tribe whose name appears on the roll provided for in section 1 hereof; and out of such sum so credited the Secretary of the Interior is hereby authorized to make available immediately to each individual member of the tribe the sum of $100; and, under such rules and regulations as he may prescribe, the sum of $1,350 to each adult and the sum of $500 to each minor for the following purposes: Purchase of land, improvement of lands to be acquired or already held by the Indian, for the erection and improvement of suitable homes, the purchase of building material, farming equipment, livestock, feed, food, seed, grain,

tools, machinery, implements, household goods, bedding, clothing, and any other equipment or supplies necessary to enable the Indians to fit themselves for or to engage in farming, livestock, industry, or such other pursuits or vocations, including education, as will enable them to become self-supporting: *Provided, however,* That the funds of the aged, infirm, decrepit, and incapacitated members may be used for their proper maintenance and support in the discretion of the Secretary of the Interior. The remainder of the share of each adult individual Indian, including accrued interest, shall be made available under such rules and regulations as the Secretary of the Interior may prescribe, and the remainder of the share of each minor Indian shall, with accrued interest, be held intact until such Indian reaches the age of eighteen years, when it shall be available under the same conditions as herein provided for adults. As herein used the term "adult" shall include the members of the tribe eighteen years of age or over, and the term "minor" shall include all members less than eighteen years of age. On the death of any enrolled member, adult or minor, the sum on deposit to his credit shall be available for expenditure for the benefit of his heirs for the purposes herein authorized.

SEC. 3. (a) Not to exceed $1,000,000 of said judgment fund, or interest thereon, shall be available for expenditure upon the request of the tribe and with the approval of the Secretary of the Interior, for the purchase of lands in the manner prescribed in section 6 of this Act.

(b) The sum of $125,000 of said judgment fund, or interest thereon, shall, at the

request of the tribe and with the approval of the Secretary of the Interior, be set aside as a loan fund for making loans to individual members, or groups of members, of said tribe under such rules and regulations as may be prescribed by the Secretary of the Interior.

(c) The remainder of said judgment fund, including interest thereon, after making the segregation provided for in section 2, and after setting aside the respective amounts authorized by this section, shall be available for appropriation, upon the recommendation of the Secretary of the Interior, and with the consent of the tribe, for purposes of benefit to the tribe, including the establishment and administration of productive enterprises for the benefit of said tribe, and any income derived from such enterprises shall be credited to the Shoshone tribal judgment fund: *Provided*, That should such enterprises also benefit the Arapaho Tribe repayment proportionate to the benefit to the Arapaho Tribe shall be made into the Shoshone judgment fund by the Arapaho Tribe out of such tribal income as the Arapaho Tribe may enjoy.

SEC. 4. That the Secretary of the Interior be, and he is hereby, authorized and directed to establish land-use districts within the diminished and ceded portions of the Wind River Indian Reservation, Wyoming, and, under such rules and regulations as he may prescribe, to effect the consolidation of Indian and privately owned lands within said districts through exchange, relinquishment, donation, assignment, or purchase of lands or interests therein, including water rights or surface rights to lands, improvements thereon and

improvements on undisposed-of ceded lands, to the end that the respective Indian and non-Indian land holdings may be consolidated for more beneficial use. Exchanges of lands hereunder shall be made on the basis of equal value, and the value of improvements on lands to be relinquished to the Indians or by Indians to non-Indians shall be given due consideration, and allowance made therefor in the valuation of lieu lands. This section shall apply to tribal land, and trust or otherwise restricted Indian allotments, whether the allottees be living or deceased. In all transactions involving tribal Indian land, the consent of the Shoshone and Arapaho Tribes shall first be obtained. Title to all lands or interests therein acquired by the Government through exchange of tribal land shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming. Title to lands exchanged for individual Indian allotments, or purchased for individual Indians with restricted funds shall be taken by the United States in trust for the individual Indian allottee or heir. The right herein granted individual Indians to acquire lands by purchase with restricted funds or by exchange shall not extend to lands on the ceded or opened portion of the reservation.

SEC. 5. That the Secretary of the Interior is hereby directed to restore to tribal ownership all undisposed-of surplus or ceded lands within the land use districts which are not at present under lease or permit to non-Indians; and, further, to restore to tribal ownership the balance of said lands progressively as and when the non-Indian owned lands within a given

land use district are acquired by the Government for Indian use pursuant to the provisions of this Act. All such restorations shall be subject to valid existing rights and claims: *Provided,* That no restoration to tribal ownership shall be made of any lands within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation.

SEC. 6. That the sum of $1,000,000 authorized in section 3 for use in carrying out the land purchase and consolidation program hereinbefore authorized shall remain available until expended and any amount expended shall be reimbursed with interest at 4 per centum per annum to the Shoshone Tribe of Indians of the Wind River Reservation from joint funds to the credit of the Shoshone and Arapaho Tribes of the Wind River Reservation or from future accruals to said joint fund, as and when said funds accrue. Title to all land purchases made hereunder shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming. All purchases of lands or interests therein made pursuant to this section shall receive the approval of the Shoshone and Arapaho Tribal Councils or of the business committees thereof.

SEC. 7. That in no event shall any portion of the Shoshone judgment fund become liable, payable, or subject to any debt or debts contracted prior to the passage of this Act by any Indian of the Shoshone Tribe except debts to the United States or to the tribe.

U. S. GOVERNMENT PRINTING OFFICE: 1945

(37)

Office - Supreme Court, U.
FILED
JAN 18 1945
CHARLES ELMORE CROPLE
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 786

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING; GEORGE C. McRAE, Treasurer of Fremont County, Wyoming; and ERNEST H. HARTMAN, Assessor of Fremont County, Wyoming,

Petitioners and Appellees Below,

vs.

UNITED STATES OF AMERICA,

Respondent and Appellant Below.

BRIEF OF AMICI CURIAE OPPOSING PETITION FOR WRIT OF CERTIORARI

GEORGE M. TUNISON,
Omaha, Nebraska

CHARLES J. KAPPLER,
Washington, D. C.

Amici Curiae

Counsel for the Shoshone Tribe of Indians of the Wind Reservation in Wyoming.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

INDEX

Page

Preliminary Statement 1

Opinions of Courts Below 4

Jurisdiction 4

Statement of the Case 4

Argument 4

1. Petitioner's Erroneous Concept 4
2. The Wind River Reservation is a Treaty Reservation 5
3. The 1868 Treaty. Absolute and Undisturbed Use 6
4. Constitution and Treaty Supreme Law of the Land 9
5. Reservation Lands are Immune from Taxation 11
6. The Lands Taxed are a part of the Indian Reservation 15
7. Interior Department Solicitor's Opinion of Feb. 12, 1943 19
8. Exemption vs. Immunity 24

Conclusion 25

CASES

Arizona v. California, 283 U. S. 423 25

Ash Sheep Company v. United States, 252 U. S. 159 15

Forty-three Cases of Cognac Brandy, 14 Fed. 539 21

Heckman v. United States, 224 U. S. 413 5

Johnson v. Maryland, 254 U. S. 51 25

Kansas Indians—Blue Jacket v. Johnson County, 5 Wall., 72 U. S. 737 11

Marchie Tiger v. Western Investment Co., 221 U. S. 286 10

INDEX (Continued)

Page

M'Culloch v. Maryland, 4 Wheat. 316, 17 U. S. 316 ..... 13, 14, 25

McCurdy v. United States, 264 U. S. 484 13

Minnesota v. Hitchcock, 185 U. S. 373 21

New York Indians, 5 Wall. 761 11

Northern Pacific Ry. Co. v. Wismer, 246 U. S. 283 21

Oklahoma Tax Commission v. United States, 319 U. S. 598 13

Penn Dairies and the United States v. Milk Control Commission of Pennsylvania, 318 U. S. 261 24-25

Shoshone Tribe v. United States, 299 U. S. 476 ..... 2, 8

State v. Shepard, 239 Wisc. 345, 300 N. W. 905 22

United States v. Board of Com'rs. of Fremont County, 53 F. Supp. 395 4

United States v. Board of Com'rs. of Fremont County, 145 F. 2d 329 ..... 4, 12

United States v. Creek Nation, 295 U. S. 103 8

United States v. Hellard (U. S. S. Ct. 1944) 88 L. ed. 929 5

United States v. Kagama, 118 U. S. 375 10

United States v. McGowan, 302 U. S. 535 21

United States, Mesta Machine Co. v. Allegheny County, 88 L. ed. 845 ..... 12, 14

United States v. Midwest Oil Co., 236 U. S. 459 23

United States v. Rickert, 188 U. S. 432 13

United States v. Sandoval, 231 U. S. 28 10

United States v. Shoshone Tribe, 304 U. S. 111 ..... 2, 19

Van Brocklin v. Tennessee, 117 U. S. 151 12

INDEX (Continued)

TEXTS AND AUTHORITIES

Page

51 American Jurisprudence, Taxation, Section 229 11

31 Corpus Juris, Indians, Sections 38-39 5

Section 107 9

Handbook of Federal Indian Law, U. S. Government Printing Office, 1942, p. 256 11

Hearings Senate Committee on Indian Affairs 16

Hearings Senate Committee on Public Lands 23

Solicitor's Opinion, Interior Department, February 12, 1943 19

CONSTITUTION, TREATIES AND STATUTES

Constitution of United States, Article VI 9

Article IV, Sec. 3 12

Article I, Sec. 8, Clause 3 ..... 9, 12

Shoshone Treaty of 1863, 18 Stat. 685 6

Shoshone Treaty of 1868, 15 Stat. 673 2

Indian Peace Commission Act of 1867, 15 Stat. 17 6

Act of March 3, 1905, 33 Stat. 1016 15

Act of Feb. 14, 1923, 42 Stat. 1246, 25 U. S. C. 335 23

Act of March 3, 1927, 44 Stat. 1347, 25 U. S. C. 398 23

Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. 463 20

Act of July 27, 1939, 53 Stat. 1128, 25 U. S. C. 571-577 ..... 2, 4, 15, 18

28 U. S. C. A. Sec. 347 4

In the
Supreme Court of the United States

—o—

OCTOBER TERM, 1944

No.....

—o—

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING; GEORGE C. McRAE, Treasurer of Fremont County, Wyoming; and ERNEST H. HARTMAN, Assessor of Fremont County, Wyoming,

Petitioners and Appellees Below,

vs.

UNITED STATES OF AMERICA,

Respondent and Appellant Below.

—o—

BRIEF OF AMICI CURIAE OPPOSING PETITION FOR WRIT OF CERTIORARI

—o—

I.

PRELIMINARY STATEMENT

The Shoshone Tribe of Indians of the Wind River Reservation in Wyoming respectfully states to the Court:

1. It is a tribe of Indians formerly and now in treaty relations with the United States and is a resident of the State of Wyoming. Its members occupy lands in

common and in severalty on the Wind River Reservation in Wyoming and the Tribe is the owner of an undivided half interest in the unallotted lands of said reservation.

2. The Shoshone Tribe formerly owned the whole of said reservation (Treaty of July 3, 1868, 15 Stat. 673, 2 Kappler 1020). In 1878 the United States wrongfully appropriated an undivided one-half of the reservation for the use of the northern Arapahoe Tribe of Indians (299 U. S. 476). In 1938 the Shoshone Tribe recovered judgment against the United States for over four million dollars for said appropriation (304 U. S. 111). This judgment was paid. Pursuant to the Act of Congress of July 27, 1939, 53 Stat. 1128, one million dollars of the Shoshones' money was made available to purchase privately owned lands, formerly a part of the reservation, and restore same to tribal use, title being taken by the United States as trustee for the tribes. The Shoshones loaned this money for the joint use and benefit of the two tribes.

3. The lands sought to be taxed by Petitioner herein are lands bought with the Shoshones' judgment fund money. The debt has not as yet been paid. Some of the lands so purchased are used by the Shoshone Tribe and its members and the remainder by the Arapahoe Tribe and its members. The Shoshone Tribe has a direct interest in the outcome of the cause.

4. George M. Tunison, Attorney at Law of Omaha, Nebraska, and Charles J. Kappler, Attorney at Law of Washington, D. C., are members of the bar of the Supreme Court of the United States, and represented the Shoshone Tribe in the recovery above mentioned. They

are, and for many years have been, attorneys for the said Shoshone Tribe, under contract approved by the Secretary of Interior and Commissioner of Indian Affairs. Said contract contains, among others, the following provision:

> "It shall be the duty of the attorney to counsel with, advise, and represent the tribe in connection with matters concerning its tribal property and funds, and any other matters affecting the rights and interests of said tribe. It shall be the duty of said attorney to advise and counsel with the tribe at their agency at Fort Washakie, Wyoming, and to represent the tribe before all Departments, tribunals, Committees of Congress, and other officers of the Government having any duty to perform in connection with the tribal affairs of the tribe at the request of the Shoshone Tribal Business Council."

5. Following the decision of this cause in the United States District Court for the District of Wyoming, the Shoshone Tribal Business Council, same being the official, elected, representative body of the Tribe, requested its attorneys, said Tunison and Kappler, to participate in its behalf in the further proceedings in said cause. The Shoshones believe that because of the familiarity of the Tribe's attorneys with the Treaties, Acts of Congress, and Executive Orders relating to said reservation, said attorneys may be of assistance to the Court in resolving the issues presented.

6. Upon the appeal to the United States Circuit Court of Appeals, Tenth Circuit, on application to the Court and leave granted, Messrs. Tunison and Kappler, as counsel for the Shoshone Tribe, filed a brief amici curiae and Mr. Tunison participated in the oral argument at Denver on September 7, 1944 (R. 39).

II.

OPINIONS OF COURTS BELOW

The opinion of the District Court of the United States for the District of Wyoming (R. 26-32) is reported in 53 F. Supp. 395. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (R. 39-44) is reported in 145 F. 2d 329.

III.

JURISDICTION

The judgment sought to be reviewed was entered October 10, 1944 (R. 44). Petition for Writ of Certiorari was filed December 27, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C. A. Sec. 347; also under the Act of July 27, 1939, 53 Stat. 1128, 25 U. S. C. A. Secs. 571-577.

IV.

STATEMENT OF THE CASE

The case is fairly stated in the opinion of the Circuit Court of Appeals (R. 39-41). Under Sec. 4 of Rule 27 of the Court further statement is unnecessary.

V.

ARGUMENT

1. Petitioner's Erroneous Concept.

The basic weakness in petitioners' argument is the failure to recognize that the Wind River Reservation is a treaty reservation; that the lands sought to be taxed are an integral, component part of that reservation; that the whole reservation, now restored to practically its size

prior to the 1905 cession, is an instrumentality of the United States used in the performance of its constitutional duty and treaty obligation and that the lands here involved are no more subject to taxation than original tribal lands never alienated from the reservation. Petitioners' whole argument revolves within the narrow orbit of a technical title in trust as exhibited in the common situation of guardian and ward or trustee and cestui que trust. Such is not the case.

The United States has a national, governmental interest in the functioning of the restored reservation; in preventing the alienation of any part thereof whether by tax sale or otherwise and in preserving it for the "absolute and undisturbed use and occupation" of the Indians pledged by the treaty. As this Court has held within the year, in United States v. Hellard (decided May 15, 1944) 88 L. ed. Adv. Op. 929:

> "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. Heckman v. United States, 224 U. S. 413, 437, 56 L. ed. 820, 830, 32 S. Ct. 424."

2. The Wind River Reservation is a Treaty Reservation.

Prior to 1871 the United States dealt with Indian Tribes through treaties. The fact and rule are stated in 31 Corpus Juris, Indians, as follows:

> Sec. 38. "Until the year 1871 the United States conceded to the Indian tribes the right to treat with the United States upon terms of national equality, and numbers of treaties were made in reference to lands, supplies, education, intercourse, and other

matters. The act of March 3, 1871, however, provided that no Indian nation or tribe within the territory of the United States should be acknowledged or recognized as an independent nation, tribe, or power, with which the United States might contract by treaty, it being further provided that no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to the date of the act, should be thereby invalidated or impaired."

Sec. 39. "A treaty with an Indian tribe has the same dignity and effect as a treaty with a foreign nation. It is a part of the law of the land, to be enforced by the courts, and cannot be disregarded by state legislation."

Numerous decisions of this Court established the above rule. The Wind River Reservation in Wyoming is one of the last of the treaty reservations.

3. The 1868 Treaty.

Prior to the Fort Bridger treaty of 1868 the Shoshone Tribe held under Treaty (18 Stat. 685, 2 Kappler, 848), 44,672,000 acres of land in Colorado, Utah, Idaho and Wyoming. Their right thereto was not disputed.

Upon the close of the Civil War the transcontinental railroads, authorized by act of Congress, were in course of construction from the Missouri River westward to the Pacific. They were obliged to cross vast tracts in possession of Indian tribes, one of such tracts being the above-mentioned Shoshone Treaty lands. To meet this situation Congress enacted the Indian Peace Commission Act of July 20, 1867 (15 Stat. 17). It was necessary under the land-grant to the Union Pacific Railroad to clear title to a strip of land through the heart of the Shoshone domain 40 miles wide and over 400 miles long.

The Peace Commission met with the Shoshones at Fort Bridger.

The United States did not "send boys to mill" as its treaty commissioners to the Shoshones. Nathaniel Green Taylor of Tennessee was a distinguished lawyer and Commissioner of Indian Affairs. John B. Henderson was a lawyer, United States Senator from Missouri and Chairman of the Senate Committee on Indian Affairs. John B. Sanborn, lawyer and soldier from Minnesota, was a brother of W. H. Sanborn, formerly Judge of the C. C. A. 8th Circuit and father of the present Federal Judge. These men well knew the force and effect, the legal and equitable import, of the words they placed in the Shoshone Treaty. The army members were Generals Sherman, Harney, Augur and Terry. They knew and respected Chief Washakie and the Shoshones and appreciated the invaluable assistance rendered in keeping open the Overland road. Henry M. Stanley accompanied the Commission as correspondent for the New York Tribune and the Missouri Democrat. There is every reason to believe that when this Commission sought and received from the Shoshones a cession of forty-four million acres of land they intended to and did vest in the Shoshones the absolute and undisturbed use and occupation of the three million acres granted in exchange.

When the Senate ratified the treaty and same was duly proclaimed, whereby there was vested in the Shoshones the "absolute and undisturbed use" of the lands forever, the United States had granted the greatest possible use consistent with retaining in the sovereign the title and authority requisite for its beneficent purposes

and constitutional duty in the administration of Indian affairs.

We quote from the opinion of this Court, by Mr. Justice Cardozo, in *Shoshone Tribe v. United States,* 299 U. S. 476-485:

> "By treaty of July 3, 1868 (15 Stat. 673), the Shoshone Tribe of Indians relinquished to the United States a reservation of 44,672,000 acres in Colorado, Utah, Idaho and Wyoming, and accepted in exchange a reservation of 3,054,182 acres in Wyoming, with other benefits not now important. The United States agreed that the territory described in the treaty now generally known as the Wind River Reservation, would be 'set apart for the absolute and undisturbed use and occupation of the Shoshone Indians . . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them.' Reinforcing this covenant, there was a solemn pledge of faith by the United States that no persons, except a few specially enumerated, and governmental agents engaged in the discharge of duties enjoined by law, should 'ever be permitted to pass over, settle upon, or reside' in the territory so reserved. The loyalty of the Shoshone tribe to the people of the United States has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return."

Further in the opinion the Court stated, p. 496:

> "Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. *United States v. Creek Nation,* 295 U. S. 103, 110."

4. The Constitution and Treaty. Supreme Law of the Land.

The Constitution of the United States provides, Art. VI:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land" . . .

The right of the Indians of the Wind River Reservation to the "absolute and undisturbed use" of their reservation lands, immune from State taxation, is guaranteed to them by the "supreme law of the land."

The Constitution also provides, Art. I, Sec. 8, Clause 3:

> "The Congress shall have Power to regulate commerce . . . with the Indian Tribes;"

In 31 Corpus Juris, Indians, Sec. 107, we find the rule:

> "Under the constitution of the United States, congress has the exclusive and unfettered power to regulate commerce with the Indian tribes. * * * The Indians and the territory which may have been specially set apart for their use are subject to the jurisdiction of the United States, and the power of congress to deal with Indians and their property is of the most sweeping character. * * * The power of congress is superior and paramount to the authority of the state within whose limits are Indian tribes. Such power does not cease when the Indians become citizens of the United States, when they become electors under state law, or when their lands are allotted in severalty."

The foregoing statement is supported by a long line of decisions of this Court. As was well stated in *United*

States v. Sandoval, 231 U. S. 28, 45; 58 L. ed. 107, 114, opinion by Mr. Justice Van Devanter (an acknowledged authority on Indian law):

> "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state. As was said by this court in United States v. Kagama, 118 U. S. 375, 384, 30 L. ed. 228, 230, 6 Supp. Ct. Rep. 1109: 'The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.' In Marchie Tiger v. Western Invest. Co., 221 U. S. 286, 315, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 575, prior decisions were carefully reviewed and it was further said: 'Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.'"

It is believed the foregoing sufficiently establish that the Wind River Reservation is an instrumentality employed by the United States, pursuant to the Constitution and Treaty, for the benefit and control of the Indians.

5. Reservation Lands are Immune from Taxation.

The rule is fairly stated in 51 American Jurisprudence, 1944, Taxation, Sec. 229:

> "As a general rule, lands in possession of an Indian tribe are exempted from taxation by a state, since such taxation would amount to the taxation of an instrumentality employed by the United States for the benefit and control of a dependent race."
>
> (Citing numerous decisions of this Court)

In Handbook of Federal Indian Law, U. S. Government Printing Office, 1942, under the subject State Taxation of Tribal Lands, p. 256, we find:

> "Lands which are occupied by a tribe or tribes of Indians have always been regarded as not within the jurisdiction of the state for purposes of state property taxation. The principal reason for this immunity has been the fact that the tribes have been regarded as distinct political communities exercising many of the attributes of a sovereign body."

The author quotes from The Kansas Indians, 5 Wall. 737, and the New York Indians, 5 Wall. 761, and later decisions of this court, illustrating the point that tribal reservations are federal instrumentalities. He concludes:

> "There seems little doubt in view of the foregoing that the validity, if not the scope, of the instrumentality doctrine, in so far as it relates to Indians, their property and their affairs, remains unchanged."

Little can be added to the authorities relied upon by the Court below in its opinion (R. 41-42), viz.:

"Article 4, Section 3, of the Constitution of the United States, vests in Congress the power of disposition of property belonging to the United States. Article 1, Section 8, authorizes Congress to enact all laws necessary and proper for carrying into execution all powers vested in the Government or in any department or officer thereof. And Article 6 provides that the laws of the United States enacted pursuant to the Constitution shall be the supreme law of the land, notwithstanding constitutions and laws of the states to the contrary. Manifestly Congress is vested with the absolute right to designate the persons to whom real property belonging to the United States shall be transferred, and to prescribe the conditions and mode of the transfer; and a state has no power to interfere with that right or to embarrass the exercise of it. Property owned by the United States is immune from taxation by the state or any of its subdivisions. Van Brocklin v. Tennessee, 117 U. S. 151, 6 S. Ct. 670, 29 L. Ed. 845; Irwin v. Wright, 258 U. S. 219, 42 S. Ct. 293, 66 L. Ed. 573; Lee v. Osceola Improvement District, 268 U. S. 643, 45 S. Ct. 620, 69 L. Ed. 1123; Mullen Benevolent Corp. v. United States, 290 U. S. 89, 54 S. Ct. 38, 78 L. Ed. 192; United States et al. v. Allegheny County, Pa., 322 U. S. 174, 64 S. Ct. 908. Congress may in its discretion waive the immunity and expressly consent that real or personal property belonging to the United States shall be subject to taxation under state authority. Mayo v. United States, 319 U. S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504. But it has not done so in this instance.

"These lands were acquired with funds belonging to the Indians; and under section 6, supra, the title is held in trust for the Tribes. But the legal title is in the United States. Generally, the posses-

sion of the legal title by the United States determines the fact and right of ownership in respect of immunity from taxation under state authority. Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687. And where the legal title is in the United States, lands are not subject to state or county taxes even though the United States holds them in trust for an Indian or a tribe. United States v. Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532; McCurdy v. United States, 264 U. S. 484, 44 S. Ct. 345, 68 L. Ed. 801. In Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 48 S. Ct. 333, 72 L. Ed. 709, it was held that oil taken from restricted land of an Indian was subject to a production tax levied under state law. In Oklahoma Tax Commission v. United States, 319 U. S. 598, 63 S. Ct. 1284, 87 L. Ed. 1612, it was determined that a state may impose an inheritance tax upon the transfer of restricted land belonging to the estate of a deceased Indian, except as to land exempt from direct taxation. In United States v. Mummert, 8 Cir., 15 F. 2d 926, it was held that land purchased with restricted funds of an Indian is subject to county ad valorem taxes. And in United States v. Hester, 10 Cir., 137 F. 2d 145, it was determined that restricted but taxable land belonging to an Indian is subject to sale in accordance with state law to enforce collection of delinquent taxes. *But in all of those cases title to the land was in the Indian, not the United States.*" (Emphasis supplied.)

Perhaps it is as well to go back to the great landmark decision in *M'Culloch v. Maryland*, 4 Wheat. 316, 428-432, 17 U. S. 316, 424-432, 4 L. ed. 579, where Chief Justice Marshall in invalidating the tax sought to be imposed by the State of Maryland, said:

"When a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by

people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

M'Culloch v. Maryland is as good law today as it was in 1819. In United States and Mesta Machine Co. vs. County of Allegheny, decided by this Court May 1, 1944, 322 U. S. 174, 88 L. ed. Adv. Op. 845, 847, we find:

"Since 1819, when Chief Justice Marshall in the M'Culloch Case expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application. In the course of time it held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government. In recent years this Court has curtailed sharply the doctrine of implied delegated immunity. But unshaken, rarely questioned, and indeed not questioned in this case, is the prin-

ciple that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation."

6. The Lands Taxed are a Part of the Indian Reservation.

The lands in question were formerly part of the Indians' treaty reservation. In 1904 the Reservation was thought to be larger than the Indians needed, resulting in a cession agreement and the Act of March 3, 1905, 33 Stat. 1016. Some of the ceded lands were eventually disposed of to white settlers and placed on the tax rolls of Fremont County (R. 26-27).

By far the larger part of the so-called "ceded portion" of the reservation remained unsold and was being used by the holders of the comparatively small acreage of sold lands along the watercourses. The Act of 1939 required the Secretary of Interior to restore these lands also to tribal ownership. The Indians had, throughout, remained the beneficial owners of these unsold lands. In the case of *Ash Sheep Company v. United States*, 252 U. S. 159, 64 L. ed. 507, the Court construed a similar agreement, made in 1904, relating to a like cession of lands on the Crow reservation in the adjoining state of Montana. The Court said:

> "Taking all of the provisions of the agreement together, we cannot doubt that while the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made, any benefits which might be derived from the use of the lands would belong to the beneficiaries, and not to the trustee, and that they did not become 'public lands' in

> the sense of being subject to sale or other disposition, under the General Land Laws. * * * Thus, we conclude that the lands described in the bill were 'Indian lands' when the company pastured its sheep upon them, in violation of Sec. 2117 of Revised Statutes."

As time went on it became apparent that an error had been made and that the so-called ceded portions of the original reservation were needed by the United States for Indian use. Sale of lands on the ceded portion was discontinued in 1915. In the printed report of the Hearing before the Senate Committee on Indian Affairs on the Judgment Fund Act of July 27, 1939, 25 U. S. C. 571-577, we find, in the letter from the Secretary of Interior, to the Chairman of the Senate Committee, reporting on the pending Bill, S. 1878, the following:

> "The future of the Shoshone and Arapaho Tribes is in the livestock industry. Range is, of course, essential. Now there are intermingled Indian and non-Indian land holdings on the reservation. The Indians desire to consolidate their holdings in the vicinity of the communities in which they live. The non-Indians wish to do likewise. The provisions of this bill will permit a readjustment of land holdings to this end. The bill authorizes the creation of land-use districts, and the progressive consolidation of Indian and white holdings by districts. One of the main reasons for the creation of such districts is to facilitate an orderly acquisition for the Indians of the white-owned lands within the reservation. The Secretary of the Interior is authorized to restore to the Indians the ceded lands in any land-use district as soon as the white owners have been properly protected, as provided in section 5. Undisposed of ceded lands within land-use districts, if not under lease or permit to non-Indians, will be restored at once, but the ceded lands now used by permittees may be re-

> stored progressively only as non-Indian-owned lands are acquired by the United States for the benefit and use of the Indians. * * * The purchased lands will be used for the benefit of both tribes."

In the evidence at the Senate Committee Hearing on July 10, 1939, officially printed for use of the Committee, we find, pp. 7-8:

> "Senator O'Mahoney. What land is it proposed to purchase?
>
> "Mr. Zimmerman. It is proposed to purchase principally white-owned lands within the ceded portion of the reservation.
>
> "Senator O'Mahoney. In other words, it is proposed to repurchase for the Indians some of those lands which years ago the Indians ceded to the Government in trust for settlement by whites?
>
> "Mr. Zimmerman. That is correct. The lands that were purchased by the whites were, naturally, the best lands. I think that in some cases it is true that the water and the river bottom have been purchased by the white settlers, and they have used the rest of the ceded portion for grazing. The purchase of those white holdings was essential for proper use of the ceded area."

The picture is clear. White settlers came in, under the Act of 1905, settled upon and purchased a comparatively small acreage along watercourses. This gave them a distinct advantage in the use of adjoining range. In the meantime the Indian Office encouraged the development of the livestock industry among the Indians. Soon it was apparent the Indians needed all the land of the so-called ceded portion. As Senator O'Mahoney stated at the above hearing, p. 6:

> "When a portion of this reservation, known as the ceded portion, was yielded to the Federal Government by the Indians and opened to settlement, settlers came on and had the understanding that they would be permitted to graze their livestock on the reservation. Permits have been issued during a long period of years to these settlers. The livestock business of the Indians, however, has been fostered by the Indian Office and is being expanded. The result has been a gradual reduction in the number of authorizations for grazing permits, making it rather difficult for the settlers."

The recovery of the Shoshone Judgment Fund made available a sufficient sum of money with which to buy back the comparatively small amount of land which had been settled upon and patented. The United States agreed that as rapidly as these patented lands were bought back and restored to tribal ownership it would return to tribal ownership the remaining unsold lands within the respective districts (Sec. 5, Act of 1939). Congress specifically directed the Secretary of Interior so to restore said lands and the mandate is being progressively carried out.

It is apparent that the Act of 1939 was a comprehensive Act by which the United States in the performance of its constitutional duty and its treaty obligation undertook to prudently manage the more than four million dollars belonging to the Shoshones and representing the original reservation lands of which they had been wrongfully deprived. One may not read the hearings before the Senate Committee and the language of the Act and escape the conviction that the Interior Department and the Congress of the United States were functioning, in their respective constitutional spheres, to restore this

governmental instrumentality to a balanced working unit. Having so restored it, there is only one standard by which to measure the estate of the Indians in the restored reservation. That standard is the language of the 1868 treaty:

"absolute and undisturbed use and occupation."

7. The Interior Department Solicitor's Opinion of February 12, 1943.

In view of the pending return of the ceded portion to the reservation a question arose about jurisdiction to regulate hunting and fishing on what was formerly known as the ceded portion. Under date of February 12, 1943 Warner W. Gardner, Solicitor for the Department of Interior, rendered a scholarly opinion on the subject. While that opinion is not relied upon, in and of itself, as an authority in the instant case, and is no part of the record, yet the law is so clearly set forth therein that Amici Curiae are pleased to adopt same as a part of their argument herein and acknowledge their debt to the Solicitor for the able statement, viz.:

> "There are, however, special circumstances applicable to the Wind River Reservation that will complicate the problem of jurisdiction over hunting and fishing upon the ceded lands. Congress in 1939 enacted the Shoshone Judgment Act already mentioned. The act set aside $1,000,000 of the fund resulting from the judgment in *U. S. v. Shoshone Tribe*, 304 U. S. 111, for the acquisition of lands in the ceded as well as the diminished portion of the reservation. Land-use districts were to be established in both portions of the reservation, and the Secretary of the Interior was authorized under such rules and regulations as he might prescribe 'to effect the consolidation of Indian and privately owned lands within said districts' through a land acquisition program.

Title to all lands so acquired was to be taken by the United States in trust for the Shoshone and Arapahoe Tribes of Indians of the Wind River Reservation. The statute further directed the Secretary of the Interior 'to restore to tribal ownership all undisposed of surplus or ceded lands within the land-use districts which are not at present at lease or permit to non-Indians; and further to restore to tribal ownership the balance of said lands progressively as and when the non-Indian owned lands within a given land-use district are acquired by the Government for Indian use.'

"Although the Shoshone Judgment Act did not, in any technical sense, repeal the act of March 3, 1905, it arrested the process of alienating the ceded lands. The sale of the lands under this act of cession had already been indefinitely postponed by the departmental action of 1915. Moreover, unlike section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U. S. sec. 463 (a), which only authorized the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservations 'if he shall find it to be in the public interest, section 5 of the Shoshone Judgment Act contained an express directive requiring the restoration of the vacant ceded lands. The program of reacquisition and restoration has already been fulfilled in large measure.

"So far as concerns the lands already restored to tribal ownership under the Shoshone Judgment Act, the jurisdiction of the tribal councils must be deemed to be the same as over other tribal lands within the exterior boundaries of the diminished portion of the reservation, and they may therefore regulate hunting and fishing on the restored lands. There would seem to be no basis for distinguishing between such lands and lands which have been formally designated as 'reservations' by Executive order, treaty, or act of Congress. An Indian reservation is simply a

part of the public domain set apart by proper authority for use and occupation by a group of Indians. *Forty-three Cases Cognac Brandy,* 14 Fed. 539 (C. C. D. Minn.). The United States holds the title, and the right of use and occupancy is in the Indians. This is precisely the state of the title under the Shoshone Judgment Act, since it provided that title is to be taken by the United States in trust for the Indians. It is true that the Shoshone Judgment Act does not expressly provide for the formal incorporation of the restored lands in the reservation, but no particular form of words is necessary to create a reservation. 'It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.' *Minnesota v. Hitchcock,* 185 U. S. 373, 390. See also *Spalding v. Chandler,* 160 U. S. 394; *Northern Pacific Railway Company v. Wismer,* 246 U. S. 283; *United States v. Payne,* 8 Fed. 883 (D. C. W. D. Ark.) In the *Wismer* case the court recognized as a reservation a tract of land that had been set aside for Indian occupancy by the Commissioner of Indian Affairs with the tacit approval only of the Secretary of the Interior rather than by an Executive order of the President. In the recent case of *United States v. McGowan,* 302 U. S. 535, the court applied the Federal Indian liquor laws to the Reno Indian Colony located on land purchased by the United States in order to settle the Indians upon them. The court held that it was immaterial that these lands were not designated as a 'reservation.'

"These cases establish that there is no peculiar virtue in the word 'reservation,' and that there is no magic formula nor special ceremony by which a 'reservation' must be conjured into existence. It is no more necessary to deposit a piece of parchment in the archives than to smoke a pipe of peace. To be sure, these cases do not establish that a reservation must necessarily be deemed to be created whenever the United States takes title to land in trust for In-

dians, or for their benefit. If the United States were to purchase isolated tracts for individual Indians, or a tract for a group of Indians who no longer maintained tribal relations, or were not subjected to the supervisory authority and guardianship of the United States, there might be no basis for contending that such lands constituted a reservation. Such is the purport of the decision in the case of *State vs. Shepard*, 300 N. W. 905 (Wisc.), in which the State Supreme Court held that various noncontiguous tracts, purchased for the Pottawatomie Indians by the United States were not reservation lands and that, therefore, a tribal Indian could be arrested for violating the conservation laws of the State. The Court distinguished the *McGowan* case on the ground that these Indians were not subject to the supervision of the United States. Assuming the validity of this distinction, the case is entirely in harmony with the current of authority.

"When, however, looking to what has been done, it can be perceived that lands have been set apart for Indian tribal use and occupancy, and that the Indians for whom the lands have been acquired are to come or to remain under the superintendence of the United States, such lands are not distinguishable from any other reservation lands. Certainly this is true of the lands acquired for the Shoshone Indians. The moneys with which they were to be purchased were appropriated by way of compensation to the Indians for the wrong they had suffered when their tribal use and occupancy had been disturbed. By directing that the lands were to be restored to 'tribal ownership,' Congress indicated that they were to be open to tribal use and occupancy. By providing for the consolidation of Indian lands in both the diminished and ceded portion of the reservation, Congress plainly indicated its intention of creating a solid reservation tract. A reservation so designed would, indeed, be superior to the checkerboarded reserva-

tions of other Indian tribes. Thus would needed lands be provided for the Shoshone Indians at the same time that the integrity of tribal life was restored. That such was the whole objective of the program appears clearly from the testimony of various representatives of the Indian Office before the Committee on Public Lands (Hearings, 77th Cong., 1st sess., pursuant to S. Res. 241, pp. 602 ff.)

"I can find no act of Congress, moreover, which is inconsistent with these general principles. Indeed, the act of February 14, 1923 (42 Stat. 1246, 25 U. S. C. sec. 335), provides that the provisions of the General Allotment Act, as amended, 'are extended to all lands heretofore purchased or which may be purchased by authority of Congress for the use and benefit of any individual Indian or band or tribe of Indians.' The Supreme Court has declared that the reference to Executive order reservations contained in section 1 of the General Allotment Act should be taken to confirm by implication the practice of establishing reservations by Executive order. *In re Wilson,* 140 U. S. 575; *United States v. Midwest Oil Company,* 236 U. S. 459; *Mason v. United States,* 260 U. S. 545. It may therefore be argued that by extending the provisions of the General Allotment Act to purchased lands the creation of reservations by purchase was sanctioned, at least when the purchase was specifically authorized by act of Congress. In any event, it could not be contended that, by subjecting purchased lands to the provisions of the General Allotment Act, Congress made the formal proclamation of a reservation, a *sine qua non* of reservation status.

"It is true that it is provided by section 4 of the act of March 3, 1927 (44 Stat. 1347, 25 U. S. C. sec. 398d), that 'changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not

be made except by Act of Congress:' but any change in the boundaries of the Shoshone Reservation will result in this case from an act of Congress, namely, the Shoshone Judgment Act itself. I see no reason for assuming that the act of March 3, 1927, contemplated that any change in the boundaries of a reservation must be expressly authorized by an act declaring *pro modo et forma* that the change may be made, and describing the new boundaries by metes and bounds. Congress must be deemed to have been aware of the doctrine that no special form or ceremony was necessary to create a reservation."

It will be noted that the foregoing official opinion of the Solicitor was written prior to the filing of the instant case. So far as counsel are aware it was written without any reference to, or knowledge of, the present controversy.

The Wyoming State officials charged with the administration of the state fish and game laws have cheerfully accepted the foregoing opinion of the Solicitor. Indeed its logic appears irrefutable. The purchased lands and the restored lands are again a part of the Wind River Reservation. Pursuant to its Constitutional duty and its Treaty obligation, the United States holds the title for the "absolute and undisturbed use" of the Indians.

8. Exemption vs. Immunity.

Petitioner repeatedly urges the point that since the Act of 1939 does not in words exempt the purchased lands from taxation such fact is an indication that no exemption was intended. This point is without merit. The immunity exists and a declaration thereof would have been surplusage. In the recent case of *Penn Dairies and*

the United States v. Milk Control Commission of Pennsylvania (1943), 318 U. S. 261, 87 L. ed. 748, this Court said:

> "We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453; Johnson v. Maryland, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; Hunt v. United States, 278 U. S. 96, 73 L. ed. 200, 49 S. Ct. 38; Arizona v. California, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522."

In the case of *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, cited in the Penn Dairies opinion, this Court, opinion by Mr. Justice Holmes, said:

> "Here is the question whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today."

CONCLUSION

It is respectfully submitted:

1. The Wind River Reservation is a Treaty Reservation.

2. The Constitution of the United States and the Treaty of 1868 are the Supreme Law of the Land applied to the instant controversy.

3. The purchased and restored lands, same being the lands involved in this cause, are a part of the tribal reservation.

4. Lands restored to the tribal reservation are immune from taxation just as are the lands which have never been separated from the tribal reservation.

5. The decision below is correct and the petition for writ of certiorari should be denied.

Respectfully,

GEORGE M. TUNISON,
Omaha, Nebraska

CHARLES J. KAPPLER,
Washington, D. C.

Amici Curiae
Counsel for the Shoshone Tribe of Indians of the Wind River Reservation in Wyoming

January 12, 1945.